

83-542

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SEP 29 1983

No. _____

ALEXANDER L STEVENS,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

P. P. LANGFORD, LINDA LANGFORD
(MRS. JERRY G.) MOORE, DESIREE LYNN
LANGFORD, MERISSA LAFAWN LANGFORD,
SHIRLEY LANGFORD,

Petitioners,

VS.

DAVID L. JAMES AND OLLEN JAMES;
BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVEALL; COMMISSIONERS
OF THE LAND OFFICE, STATE OF OKLAHOMA;
UNITED STATES OF AMERICA,

Respondents.

BOUNDARY SUIT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
TENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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Whether or not the Court of Appeals, in affirming this case erroneously construed Art. 3 of the Boundary Treaty of 1819, 3 Stat. 252, and erroneously applied sections 2, 4, 5, 6, and 7 of the Boundary Decree of this Court in the case of Oklahoma v. Texas, Decree of March 12, 1923, reported in 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687, [Appendix E, pages A57-A59],

(A) by approving the District Court's use or application of Oklahoma law in fixing the legal standard of the factual elements of an avulsion; and,

(B) by approving the District Court's selection of a boundary bank at the foot of a hill ten feet high, the foot of which hill is level with the top of the fluvial valley of the river--a rejected contention made by Oklahoma and the United States in this Court, see Oklahoma v. Texas, 260 U.S. 606, at pages 625 and 634-636, 43 S.Ct. 221, 67 L.Ed. 428, (1923).

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OF THE LAND OFFICE, STATE OF OKLAHOMA;
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the opinion and judgment of affirmance of the United States Court of Appeals, Tenth Circuit, which was a review of the opinion and judgment of the United States District Court, Western District, Oklahoma.

OPINIONS BELOW

The opinion and judgment of affirmance of the Court of Appeals is reported in 701 F.2d 123. The opinion and judgment of the District Court is reported in 558 F.Supp. 737. A true and correct copy of the opinion and judgment of affirmance of the Court of Appeals is annexed to this petition as Appendix A, page A1. A true and correct copy of the opinion and judgment of the District Court is annexed to this petition as Appendix B, page A 13.

GROUNDS FOR THIS COURT'S JURISDICTION

The date of the opinion and judgment of the Court of Appeals and the time of its entry is February 28, 1983. The date of the Order denying petitioners' Motion for Rehearing and the time of its entry is July 1, 1983. These dates are stated in the official reporter, 701 F.2d 123. Appendix A is a reproduction of the slip opinion.

28 U.S.C. §1254(1) is believed to confer on this Court jurisdiction to review the judgment of affirmance by writ of certiorari.

The reviewing jurisdiction of this Court is grounded upon the proposition that the question presented and the asserted error of the Court of Appeals draw in question an erroneous construction of the Boundary Treaty of 1819, 3 Stat. 252, which fixed and established the boundary in question and also draw in question an erroneous application of the Boundary Decree of this Court in the case of Oklahoma v. Texas, Decree of March 12, 1923, reported in 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687, all of which is federal law. A true and correct copy of the pertinent parts of the Boundary Decree is annexed to this petition as Appendix D, page A53, and pertinent parts of the Boundary Decree is annexed as Appendix E, page A56.

The case of Cissna v. Tennessee, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720, 1918, is also relied upon by petitioners to sustain this Court's reviewing jurisdiction.

If federal law fixes the legal standard of the factual elements of an avulsion, as that term is used and intended in the above mentioned Boundary Decree, since the Court of Appeals approved of the use of Oklahoma law, a federal question is presented for review in order that a "correct application of the rule to changes in the [Red River] is necessary in order that proper effect may be given to the [Boundary Treaty of 1819] by which [Red River] was established as an interstate boundary, and hence this is a question of federal law." Cissina, supra, 246 U.S. at page 296. (Emphasis added.)

In effect, if federal law must measure the facts which constitute the action of Red River with respect to the changes of its bed and banks in order that proper effect therefrom can be given to the Boundary Treaty of 1819, a federal question is presented that will ground this Court's reviewing jurisdiction.

The question of the jurisdiction of this Court to review this case coalesces with the appellate merit questions.

The Provisions of the Boundary Treaty, Boundary Decree, Oklahoma Statutory and Common law, and Federal common law that are involved in this case

This case involved the following cited matter which has been correctly copied and made a part of the Appendix:

Art. 3, Boundary Treaty of 1819, 3 Stat. 252, Appendix D, page A 53.

Partial Decree Relating to State Boundary, Entered March 12, 1923, in Equity, No. 18, Original, from State of Oklahoma v. State of Texas, United States, Intervenor, 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923), Appendix E, page A 56.

Oklahoma statutory and common law, Appendix F, page A 60. Title 60 Okla. Stat. Anno. §§335 to 340, inclusive; Willett v. Miller, 176 Okla, 278, 55 P.2d 90; Goins v. Merryman, 183 Okl. 155, 80 P.2d 268; Mapes v. Neustadt, 197 Okl. 585, 173 P.2d 442; Nolte v. Sturgeon, Okl. 376 P.2d 616; State ex rel Com'rs of land Office v. Seelke, Okl. 568 P.2d 650; Cherokee South Corp. v. Ledford, Okl. 603 p.2d 351.

Federal decisional law construing the federal boundary treaty law on Red River, Appendix G, page A87. U.S. v. Texas, 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867, (1896). Oklahoma v. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428, (1923).

Extract from Cissna v. Tennessee,
246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720,
(1918). Appendix H, page A 94.

Petition for Rehearing to the Court
of Appeals, Appendix C, page A 47.

STATEMENT OF THE CASE AND FACTS
MATERIAL TO THE CONSIDERATION OF
THE QUESTION PRESENTED

This is boundary case. The boundary in question is the south bank of Red River, the interstate boundary between Texas and Oklahoma, which is a political boundary as well as a boundary between land located on each side of the river. The case is a dispute as to its correct location on the ground between land located in Oklahoma and land located in Texas. The Oklahoma side land is situated in Jefferson County, Oklahoma and the Texas side land is situated in Clay County, Texas. The lands in question are located on opposite sides of the boundary. Collectively, the petitioners are the landowners of the land on the Texas side of the boundary and collectively, the respondents are the landowners of the land on the Oklahoma side of the boundary.

The facts material to a consideration of the question presented are found stated in the findings of fact made by the District Court in its opinion, and they are set forth in Appendix B, beginning on page A19 of the Appendix.

The basis of jurisdiction in the District Court over individual defendants was diversity of citizenship--28 U.S.C. §1332(a)--and over United States of America by 28 U.S.C. §§1336 (f) and 2409a.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Rule 17-1-(C) of this Court provides in pertinent part as follows: "When a ... federal court of appeals... has decided a federal question in a way in conflict with applicable decisions of this Court", this Court may grant a writ of certiorari to the Court of Appeals to review its judgment and decision.

Petitioners assert that conflicts, within the meaning of the quoted rule, which are sufficiently substantial, as will be hereinafter made to appear,

require that this Court's supervising discretion be invoked to resolve an asserted conflict between the way the Court of Appeals applied §§ 2, 4, 5, 6, and 7 of this Court's Boundary Decree and the way this Court intended it to be used. The way this Court intended it to be used would give effect to this Court's construction of the Boundary Treaty. This Court's construction of the Treaty will be denied and not given effect by the judgment of the Court of Appeals unless it be reviewed, revised and corrected.

Except for the clarifying closing modification of the District Court's opinion and judgment regarding the scope of the judgment against Texas and Oklahoma, the Court of Appeals approved of the District Court's findings of fact and conclusions of law in *toto*.

Hereinafter, unless specifically noted, the term "court below" refers to and means the approval by the Court of Appeals of the findings, conclusions and judgment of the District Court.

In addition, as was used in the opinions of both Court's below, the Oklahoma side will be referred to N (E) and the Texas side by S (W).

The boundary fixed and determined is along the "wheat field bank". The wheat field bank is located at the foot of a range of hills which fringe the south side of the valley through which the river runs.

The boundary fixed and determined is the exact contention that Oklahoma and the United States made to this Court in Oklahoma v. Texas. See 260 U.S. 606 at page 625, 43 S.Ct. 221 67 L.Ed. 428 (1923).

" . . . Oklahoma and the United States contend that the bank and boundary are at the foot of a range of hills or bluffs which fringe the south side of the valley through which the river runs."

This contention was rejected by this Court at page 631-632 of 260 U.S. The rejection is stated as follows:

". . . we hold that the bank intended by the treaty provision is the water-washed

and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods where they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which has the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood."

(Emphasis added.)

The Decree to effectuate the opinion was entered and is reported at 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923). Later, in 1924, paragraphs numbered 5, 6 and 7 were amplified. The opinion is

reported at 265 U.S. 493, 44 S.Ct. 571, 68 L.Ed. 1118. The Decree to effectuate this opinion is reported at 265 U.S. 500, 44 S.Ct. 573, 68 L.Ed. 1121. The amplification paragraphs are as follows:

The foregoing specifications [paragraphs 5, 6, and 7 of the 1923 Decree] applied in the light of the opinion, admit of, and require the exercise of practical judgment in determining the line intended; but certain fundamentals, such as the following, obviously must form the final basis for the exact location of the line.

"The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank and the higher level of it that just does not overtop the cut bank. The physical top of the cut bank being very uneven in profile, cannot be a datum for locating the boundary line, but a gradient along the bank must be used for that purpose. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity. The boundary has been determined accordingly."

We find nothing in what was thus said which indicates that the commissioners misapprehended the decree or failed to give proper effect to it; and after examining their report and the accompanying maps we think the decree was rightly construed and given full effect. The gradients used as representing the ordinary high and mean levels of the waters, when washing but not overflowing the bank, were not unbroken lines arbitrarily projected from one end of the Big Bend Area to the other, but were broken lines adjusted to prevailing levels in relatively short sections. That course was both reasonable and practical. Within the sixteen miles along that area the river varies in width from 2200 to 6000 feet. Naturally the waters when entering the narrower sections choke and attain higher levels, and when entering the broader sections spread out and fall to lower levels. There is nothing in the decree to prevent a reasonable and practical solution of the problem incident to those varying water levels. And so of the problem incident to the irregularities in the elevation of the bank."

The Oklahoma side bluff, the valley land and hills on the Texas side which fringe the valley are described in the opinion of the District Court. The wheat field bank is therein said to be at the foot of a hill, upon which there rests a wheat field. This quote is from p. 741 of 558 F.Supp; Appendix C, page A20.

" . . . The Oklahoma bank of Red River in the disputed areas is a prominent bluff that rises vertically some forty feet or more. The present active channel of the river runs along this bank for most of the distance adjacent to the disputed lands. This channel bed consists of loose sand and is completely devoid of vegetation. It is bounded by low banks, cut into the sand bed of the river ranging upward to approximately three to four feet high above the channel bed. In many areas, the channel has no discernible vertical banks and only a gradual slope as a boundary. The disputed lands extend westward from the channel to the wheat field bank nearly a mile to the west where the surface of the land arises sharply approximately ten feet. The wheat field bank is an erosion bank, formed by the

cutting action of the river when the active channel ran along that bank, and this bank marks the eastern boundary of a cultivated wheat field comprised of land formed from deposits by the river action in recent past geologic time, but which now possess all of the characteristics of fast land. This field has been under constant cultivation for many years and is overflowed only in periods of extreme flooding. To the west of the wheat field is another prominent bank characterized by an outcropping of bedrock rising some twenty feet above the wheat field.

The following quotation from the opinion of the Court of Appeal indicates that it misunderstood the findings of fact made by the District Court. The quote is from p. 125 of 701 F.2d, Appendix A, p. A7.

"... .This determination was in accordance with the evidence, and concluded that the south bank (west bank) was what the parties had referred to during trial as the "wheat field bank." This was a cut bank some three to four feet high along the eastern edge of the cultivated field on the western-southern side of the river."

Section 2 of the Boundary Decree, 261 U.S. 340, supra provides:

"2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred."

And, the following was said in the opinion at 260 U.S. 631-632 about "adjacent upland":

". . . we hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill . . .".

The "adjacent upland, whether valley or hill" is the land that furnishes the earth that comprises the banks inside of which is the river "bed". Under the determination by the courts below, there is no possibility of their being

"adjacent upland" in the valley in the disputed land. Under the boundary as determined in the courts below all valley land is in the "bed" of the river. The only "adjacent upland" on the Oklahoma side is land 40 feet above the valley and is situated east of the bluffs. The only "adjacent upland" on the Texas side is land 10 to 30 feet above the valley and is situated west of the foot of the hills which fringe the valley land. As a result, there could be no "avulsion" in the valley land for the reason that in the valley there would be no "adjacent upland".

It should be noticed, therefore, that the "avulsion" of 1908 found by the courts below is an impossible avulsion for there was no "adjacent upland" through which the avulsive action of the water of the river could operate upon. There is much evidence in the findings of fact in the courts below that there was "adjacent upland in the river valley". It was found that the valley land had timber, grasses, bushes, cultivated land and cattle were grazed thereon.

In reaching the boundary determination, the courts below have the river and its water volume as the guiding standard of decision. Such standard is not provided for by this Court. The river is not the boundary. It is the south bank that is the boundary. The location of the south bank is to be determined by using the flowing water in the river "bed" as the datum. The banks are uneven in their profile and are not a proper datum. The water volume to be used to determine the bank altitude is the average or mean level attained by the waters in the periods where they reach and wash the bank without overflowing it. To determine the water volume that is average or mean, a gradient along the bank must be used. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity.

It becomes clear that the Court of Appeals has so substantially departed from the opinions and decrees of this Court that its work must be corrected in order to enforce this Court's construction of the Boundary Treaty of

1819, as expressed in Oklahoma v. Texas. In order to give effect to the Boundary Treaty, it is necessary that this Court require that the Court of Appeals conform its opinion and judgment to the guidelines found stated in this Court's opinions and decrees in Oklahoma v. Texas. To do so requires that this Court use its discretion and issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

The next conflict arises from a latent application of Oklahoma law by the courts below, (p. 743 of 558 F. Supp., Appendix B, p.31), to a federal question of law inherently required to be used, as this Court held in Cissna v. Tennessee, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720, (1918), (Appendix H, p. 94), in order to give effect to the Boundary Treaty of 1819 from the action of Red River with respect to changes of its bed and banks.

The consequential conclusion of "avulsion" reached by the courts below cited only Oklahoma law, none involving Red River, in support of the conclusion. All Oklahoma cited cases involved Oklahoma interior rivers. Threshold law

fixes the legal standard of the factual elements of an avulsion. The courts below used Oklahoma law to delineate such threshold law. Oklahoma has a statute, Title 60 sec. 336, Okla. Statutes Annotated, (Appendix F, p. 60-61), which provides in substance that the factual elements of an avulsion are: (1) the new river bed must be formed quickly and suddenly; and (2) the land between the old and new beds must be identifiable. Willett v. Miller, 176 Okl. 278, 55 P.2d 268 (1936), (Appendix F, p. 62) construed this statute, (Appendix F, p. 71), with respect to identification of land between the old and new river beds, to mean that "if the change is so sudden that the owner of land washed away is able to point out approximately as much land added to the opposite bank as he had washed away, the doctrine of avulsion applies. . ." The Oklahoma Supreme Court in Willett struggled with this Court's opinion and decision in Nebraska v. Iowa and decided that it was not to be followed. (Appendix F, p.67-68.)

Two years later in 1938, in Goins v. Merrymen, 183 Okl. 155, 80 P.2d 268,

(Appendix F, p. 72), speaking about Willett's case not following Nebraska v. Iowa, the Supreme Court of Oklahoma, said:

"But contrary to these holdings, the statute regarding avulsion in this state has been relaxed by judicial construction in the Willett v. Miller. . . ." (Appendix F, p. 75)

In Oklahoma v. Texas, (Appendix G, p. 90), this Court adopted the rules stated in Nebraska v. Iowa, (Appendix G, p. 91-92), where, in that case, the federal law regarding the legal standard of the factual elements of an avulsion on the Missouri were stated.

In substance, they are: In an avulsion the land between the old and new river beds must be identifiable--that is, not destroyed. The idea is carried forth into section 2 of the Boundary Decree of this Court. (Appendix E, p. 97) The new river bed must run through "adjacent upland". "Adjacent upland" is undisturbed, identifiable land.

The facts found by the District Court, (Appendix B, p. 22 et. seq.),

under Oklahoma law, is an avulsion. Under Willett's case, James' remote grantor had as much land between the old and new river beds after the flood of 1908 as he did prior to the flood, even though as the courts below found, that land was "scoured away" by the flood, its vegetation washed away and it was a sand bar of washed in sand during the scouring process. Under section 2 of the Boundary Decree and under the requirements set forth in Nebraska v. Iowa, it failed to have the factual element of undisturbed, identifiable land and could not have been an avulsion.

By using Oklahoma law, when federal law was required, improper effect to the Boundary Treaty from the action of Red River with respect to changes of its bed and banks, has been given.

For the same reasons previously set forth, the discretion of this Court must be invoked to issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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83-542

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U.S. DISTRICT COURT
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SUPREME COURT OF THE UNITED STATES

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UNITED STATES COURT OF APPEALS
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VOLUME ONE — APPENDIX

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I

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

81-2313

81-2413 (cross-appeal)

81-2428 (cross-appeal)

DAVID L. JAMES and OLLEN JAMES,
Plaintiffs, Appellees and
Cross-Appellants,

BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVALL,
Plaintiffs in Intervention,
Appellees,

v.

P.P. LANGFORD, LINDA LANGFORD
(MRS JERRY G.) MOORE, DESIREE LYNN
LANGFORD, MERISSA LAFAWN LANGFORD,
SHIRLEY LANGFORD,
Defendants, Appellants and
Cross-Appellees,

UNITED STATES OF AMERICA,
Defendant and Cross-Appellee,

COMMISSIONERS OF THE LAND OFFICE,
STATE OF OKLAHOMA,
Defendants and Cross-Appellants.

Appeal From
The United State District Court
For The
Western District of Oklahoma
(D.C. Civil No. 75-461-D)

This suit is a quiet title action brought by David and Ollen James against the Langfords, the United States and the Land Commissioners of the State of Oklahoma. The dispute is over ownership of portions of the bed of the Red River. The plaintiffs are the surface owners of land, for the most part on the Oklahoma side, in Sections 13 and 24 of Township 5 South, Range 9 West, of the Indian Meridian. They claim ownership of the stream bed westerly to its south (west) bank. The defendants Langford own land on the south (west) side of the river in Texas, and claim a portion of the bed of the stream based on the application of the accretion doctrine and by adverse possession. Certain intervening parties own mineral interests. The State of Oklahoma claims the stream bed from the medial line to the south (west) bank and other mineral interests. The United States also claims the stream bed from the medial line to the south (west) bank.

The issue basic to the dispute is the location of the south (west) bank of

the river. Our view and the view adopted by the trial court is that this matter is to be determined by the application of the opinion in Oklahoma v. Texas, 261 U.S. 340 and 345. This decision in 1923 fixed the boundary between the states, and it also described the standards to be applied in determining the location of the south bank of the river at any particular location. The Red River runs in a generally easterly direction and Texas is on the south side and Oklahoma on the north side. At the particular location where the disputed land is located the river is running in a southerly direction. The prior cases have not used the terms "right" or "left" bank, but have used "south bank" or "north bank" or "west bank" and will do likewise. The "west bank" as here used is the same as the "south bank".

The parties in Oklahoma v. Texas sought to determine what was the boundary between the United States and Spain established by the treaty of 1819. This boundary was along the south bank (west bank) of the Red River as it existed in 1821, the effective date of the treaty.

This became the boundary between Oklahoma and Texas, and was described in the Partial Decree and the Supplement to the Final Decree of the Supreme Court. The United States had intervened and the Court determined the extent of its ownership in the bed of the Red River as against the claims of Oklahoma. As mentioned, the basic issue was the general location or description of the south bank (west bank).

In the Supplement to Partial Decree in Oklahoma v. Texas the Court was considering the bed of the Red River, lands bordering on the north side, and the portion of the river between the 98th Meridian and the mouth of the North Fork. The land in question in this appeal is in this stretch of the river. In our case of Bradford v. United States, 651 F.2d 700, the concern was with another and different part of the river--that part west of the North Fork.

The Supreme Court in the Supplement made a clear and specific determination of ownership of the river bed as between the United States and Oklahoma. The

Court there in part held: "The full title and ownership of so much of the bed of the river as lies south of its medial line are in the United States." There were certain exceptions to the general statement, but none are pertinent here.

The Court also as to Oklahoma's claim there stated:

"Where, under grants from the United States, the State of Oklahoma owns lands bordering on the north side of the river the State has the same riparian rights in the river bed that an individual owning the same lands under a patent or Indian allotment would have."

Important for this appeal, the Court in Oklahoma v. Texas set forth standards to identify and to locate the south bank of the Red River at any particular place. Thus:

"5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which

separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

"6. The boundary between the two States is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

"7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it."

The trial court in the case before us applied these standards to the facts developed in the trial and so identified the south bank at the location of the lands in question. This determination was in accordance with the evidence, and concluded that the south bank (west bank) was what the parties had referred to during trial as the "wheat field bank." This was a cut bank some three or four feet high along the eastern edge of a cultivated field on the western-southern side of the river. This position or location met the requirements described in Oklahoma v. Texas. The main channel had run along this edge for an extended time. In any event, the water when the riverbed was full would rise to reach or to wash against this "relatively permanent elevation" which separates the bed of the stream from the upland but would not overflow it except in times of unusually high floods. An 1861 survey by the State of Texas followed quite closely this wheat field bank. The record shows extremely wide fluctuations in the flow of the stream with very large

volumes at flood stage. During periods of high water, but short of flood stage, much of the land in question--that is the area east-north of the wheat field bank--is covered with water. The stream bed is there between one and two miles in width with variations in the vegetation. There are bluffs on both sides of the river farther back from the "banks".

The Court in Oklahoma v. Texas also stated the definition of the "medial" line of the Red River. Section 5 of the Supplement contains this definition. This is, of course, fully applicable here as to the title and claims of Oklahoma and its successors in title.

The other basic issue determined by the trial court was the nature of the changes in the location of the Red River since 1923. This required a typical application of the doctrines of avulsion and accretion. The Court in Oklahoma v. Texas had anticipated the problem and directed the application of the doctrines. The Supreme Court thus stated in part after a reference to the south bank of the river as it existed in 1821:

"Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred."

The Court then said that this would be applicable to "such changes as may occur in the future." The directions for a survey contained in paragraph 12(c) of the Partial Decree in Oklahoma v. Texas also direct the application of the doctrines.

In our view the trial court correctly applied the rules and concluded that the changes since 1923 in the area in question came about through at least several large floods. A flood in 1908 caused a very substantial change in the area in question, and a new active channel was created east of the old location. There was also a flood in 1935

during which the channel moved farther east. In 1940 a highway bridge was built along the north side of the lands in question. Subsequent repeated efforts to protect this bridge have caused changes in the stream flow. There were also floods in 1941 and 1957, and the railroad bridge in the general area was washed out.

The trial court thus found that the portion of the stream bed in question "was not added to the land of Defendants Langford on the south (west) bank of the Red River by accretion or reliction as said Defendants contend." The Langfords' claim to a portion of the stream bed based on a "bank" nearer to the center of the general stream bed and based on accretion was not supported by the record. The trial court instead found that the movement of the channel of the stream and the change in the stream bed were the result of avulsion during the 1908 flood and the several subsequent large floods. The findings of the trial court are supported by the record. We fully agree with the conclusions reached

as they are in accord with the applicable doctrines and with Oklahoma v. Texas.

We do not propose to discuss the adverse possession issue as the record fully supports the findings made by the trial court. We agree with the court's application of the appropriate rule.

Also, we must hold that the State of Oklahoma's claims here advanced to the bed south (west) of the medial line of the river were resolved by Oklahoma v. Texas. The issues were there considered in their basic form, and the variations here advanced do not change the issues and concepts there urged and decided.

Our only departure from the conclusions reached by the trial court is that we hold that there was no jurisdiction to determine the state line as a political boundary between Texas and Oklahoma. There was, of course, jurisdiction to decide the location of the south (west) bank of the Red River and to resolve all the disputed ownership issues.

AFFIRMED.

FILED

United States Court of Appeals

Tenth Circuit

February 28, 1983

HOWARD K. PHILLIPS, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-75-461-D

DAVID L. JAMES and OLLEN JAMES,
Plaintiffs,

BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVALL,

Intervening Plaintiffs,

vs

P.P. LANGFORD, LINDA LANGFORD
(MRS. JERRY G.) MOORE, DESIREE LYNN
LANGFORD, MERISSA LAFAWN LANGFORD,
SHIRLEY LANGFORD, and
THE UNITED STATES OF AMERICA and
THE COMMISSIONERS OF THE LAND OFFICE,
STATE OF OKLAHOMA,
Defendants.

MEMORANDUM OPINION

This is a declaratory judgment action to quiet title to real property lying in the bed of the Red River between Jefferson County, Oklahoma, and Clay County, Texas. The Court has subject matter jurisdiction over Plaintiffs' claims against the individual Defendants pursuant to 28 U.S.C. §1332 by reason of diversity of citizenship and amount in controversy and over Plaintiffs' claims against the Defendant United States of America pursuant to 28 U.S.C. §§1334(f) and 2409a. An extensive non-jury trial has been conducted herein and this matter is now ready for decision by the Court.

It appears from the record before the Court in this case that Plaintiffs David L. James and Ollen James (hereinafter referred to as Plaintiffs) originally commenced this action and are the surface owners of certain riparian lands on the Oklahoma side of the Red River in Jefferson County, Oklahoma, including all of Section 13, Township 5 South, Range 9 West of the Indian

Meridian and Lots 1, 2, 3 and 4 of Section 24 of the same township. Plaintiffs claim ownership of the bed of the Red River to the south (west) ¹ bank thereof opposite their land in Section 13 and to the medial line of the Red River bed opposite their lands in Section 24. The Court allowed the Intervening Plaintiffs, Bruce Wright, Mary Ben Wright and Anna Mae Stovall (hereinafter referred to as Intervenors), to intervene in this case as parties plaintiff as they own the minerals under Plaintiff's land in Section 24 and their interest is co-extensive with Plaintiffs' surface ownership in said section. The Commissioners of the Land Office of the State of Oklahoma (hereinafter referred to as Commissioners) were made a party to this case and are aligned with the Plaintiffs as the Commissioners own the minerals under Plaintiffs' land in Section 13 and any rights retained under a certificate of purchase issued to Plaintiffs thereon, and the Commissioners' mineral ownership is co-extensive with Plaintiffs' surface ownership in said section.

The Defendant United States of America claims ownership of the Red River bed from the medial line to the south (west) bank opposite all lands in Sections 13 and 24 as trustee for certain Indian Tribes. Defendants P. P. Langford, Linda Langford (Mrs. Jerry G.) Moore, Desiree Lynn Langford, Merissa LaFawn Langford and Shirley Langford (hereinafter referred to as Defendants Langford) own lands on the Texas side of the Red River directly opposite Plaintiffs' lands in both sections and claim ownership to the south (west) bank of the Red River.

In Oklahoma v. Texas, 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831 (1921), the United States Supreme Court determined that the boundary between Oklahoma and Texas, as fixed by the Treaty of 1819 between the United States and Spain, was the south bank of the Red River. See United States v. Texas, 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867 (1896); see generally L. Miles, "Southern Boundary of Oklahoma," in Boundaries of Oklahoma 27 (J. Morris ed. 1980). Later in the

course of the Oklahoma v. Texas litigation, the Supreme Court concluded that:

[The] cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundry is on and along that bank at the mean level of the water when it washes the bank with-out overflowing it.

The boundary as it was in 1821, when the treaty became effective, is the boundary of to-day, subject to the right of application of the doctrines of erosion and accretion and of avulsion to any intervening changes.

Oklahoma v. Texas, 260 U.S. 606, 636, 43 S.Ct. 221, 67 L.Ed. 428 (1923); see Oklahoma v. Texas, 261 U.S. 340, 341-342, 43 S.Ct. 376, 67 L.Ed. 687 (1923).

In view of the foregoing, it is clear that the primary issue in this case is the location of the south (west) bank of the Red River in the disputed area.² In this connection, Plaintiffs contend that the south (west) bank in this area is the so-called "wheat field bank" which is a well-defined embankment immediately to the east of the presently cultivated lands of Defendants Langford

on the Texas side of the river. Defendants Langford contend that the south (west) bank is along a well-defined bank immediately to the west of and adjacent to the present water course of the river. The area in dispute between the two lines encompasses approximately 900 acres.

Defendants Langford further contend that the lands between the two lines described above have been added to their lands by the processes of accretion and/or reliction. Plaintiffs assert that there has been no accretion by which the boundary has moved from the line described above, and if the course of the river has been altered, it has been the result of avulsion caused by embankments and bank stabilization jetties constructed in connection with the erection and protection of State Highway 79 bridge across the Red River near the north boundary of the lands involved herein. Furthermore, Plaintiffs claim that an avulsion occurred in the course of a major flood in 1908 causing the water course of the river to move suddenly eastward from the "wheat field bank" a

distance of approximately one-half mile and that such an avulsive change in the water course did not change the south (west) boundary of the river as it then existed. Plaintiffs thus claim that the boundary remained along the "wheat field bank" where the river ran prior to the avulsive movement of the water course.

Defendants Langford deny the Plaintiffs' avulsion claims and assert that if there was an avulsion, Defendants Langford have occupied the lands in dispute and practiced husbandry and generally used the lands for the grazing of livestock for a sufficient period of time to have acquired the same by adverse possession pursuant to the applicable statutes in both Texas and Oklahoma.

Upon consideration of the pleadings, the oral and documentary evidence received at trial and the arguments, briefs and contentions of counsel, the Court makes the following findings of fact and conclusions of law in this case which are incorporated herein pursuant to Rule 52, Federal Rules of Civil Procedure:

The portion of the Red River lying between Oklahoma and Texas flows in a generally eastward direction, slightly to the south, but the flow in the area of the disputed lands involved in this case is virtually north to south. The numerous aerial photographs and maps before the Court indicate that the present watercourse in the area generally follows a serpentine path between well-defined outer banks which range from one to two miles apart. The low water channel of the river meanders irregularly between the banks, frequently braiding into multiple streams and washing the outer banks at several points along the course of the river. The meander loops tend to move downstream through the process of erosion on the outer edges of the loops where the water flows faster than at the inner edges. Also, major fluctuations in the water level cause significant changes in the location of the channel over short periods of time. The Oklahoma bank of the Red River in the disputed area is a prominent bluff that rises vertically some forty feet or more.

The present active channel of the river runs along this bank for most of the distance adjacent to the disputed lands. This channel bed consists of loose sand and is completely devoid of vegetation. It is bounded by low banks, cut into the sand bed of the river and ranging upward to approximately three to four feet high above the channel bed. In many areas, the channel has no discernible vertical banks and only a gradual slope as a boundary. The disputed lands extend westward from the channel to the wheat field bank nearly a mile to the west where the surface of the land rises sharply approximately ten feet. The wheat field bank is an erosion bank, formed by the cutting action of the river when the active channel ran along that bank, and this bank marks the eastern boundary of a cultivated wheat field comprised of land formed from deposits by river action in recent past geologic time, but which now possesses all of the characteristics of fast land. This field has been under constant cultivation for many years and is overflowed only in periods of extreme flooding. To the west

of the wheat field is another prominent bank characterized by an outcropping of bedrock rising some twenty feet above the wheat field.

The State of Texas surveyed the lands on the west side of the Red River at this point in 1861, which survey extended to the wheat field bank and was the basis of a patent originally granted to one Rueben Brown. The present wheat field bank closely approximates the 1861 survey bank except that the present wheat field bank opposite the south half of Section 24 is west of the original survey line, resulting from erosion of the wheat field bank occurring since the 1861 survey. In 1874, the United States surveyed along the Oklahoma bank at which time the east bank of the Red River was to the west of its present location. The present active channel lies almost completely upon lands east of the Oklahoma bank according to the 1874 survey.

The uncontroverted evidence before the Court indicates that prior to 1908, the active channel of the river ran along the wheat field bank, and the riverbed

east of that location was covered with vegetation, including some large trees. A major flood occurred in 1908, which resulted in the movement of a large amount of sand downstream or "scouring" of the riverbed, and washed out the vegetation and timber located there. When the flood waters receded several days later, there was a new active channel, approximately one-half mile east of the previous location. The intervening area between the old and new channels had become a large sand bar, completely scoured of vegetation. The new active channel crossed the disputed lands about halfway between the wheat field bank and the present channel location. Vestiges of the pre-1908 channel and the channel which succeeded it are still visible both from aerial photographs and engineering profiles in evidence before the Court. A single large elm tree, estimated by some witnesses to be over 100 years old, is located approximately 1,000 feet east of the wheat field bank. This tree is by far the largest and oldest in the area, and its location is consistent with the

presence of a prior channel west of it in the past. The average age of vegetation on the disputed land is about thirty-five years or less.

Similarly, prior to 1935, the active channel opposite the south line of Section 24 was located about three-fourths of a mile west of the Oklahoma bluff. The fast land between the bluff and channel was covered with timber, and parts thereof were being actively cultivated in annual crops. A major flood occurred in 1935, which washed out the crops and timber, along with the fast land in that area. After the flood waters receded, the channel had moved eastward about one-half mile to a point approximately 200 yards west of the Oklahoma bluff. Vestiges of this previous channel also are visible on aerial photographs before the Court. Thereafter, the channel migrated slowly to its present location.

In 1941 a railroad bridge constructed in the early 1920's across the Red River at a point near the south boundary of Section 13 was washed out in

a major flood and has never been replaced. Vestiges of the former railroad right-of-way are still visible. In 1940, a highway bridge was constructed at a location which bisects the westerly extended north line of Section 13 in a southwest to northeast direction, approximately along the north edge of the disputed lands. The bridge structure consists of a major steel truss bridge approximately 2,200 feet long extending westward from the Oklahoma bluff, and spanning the present active low water channel. Extending westward from the bridge is an embankment some 1,800 feet long on the top of which the highway is constructed. Then to the west is a "relief structure" or smaller bridge, about 1,000 feet long, extending from the west edge of the embankment to the wheat field bank. The relief structure, (or the west bridge) was designed to permit the waters of the river to utilize a definite high water channel along the wheat field bank in periods of substantial flow and thereby provide "relief" or protection for the bridge and embankment against destructive erosion.

The right-of-way secured by Texas for the highway extends only to the wheat field bank.

At the time the highway bridge was constructed in 1940, the active channel ran close to the Oklahoma bluff for a considerable distance both above and below the bridge location. Since that time, the channel has meandered laterally to the west a distance of more than a mile immediately above the bridge, where it actively impinges upon the wheat field bank. From that point, the channel makes an abnormally tight meander loop to a point immediately north of the embankment between the two bridges and extends in a slightly northeasterly direction to a point where the channel again sharply changes direction to go under the main bridge. Commencing as early as 1955, the Oklahoma and Texas Highway Departments have jointly undertaken bank stabilization projects designed to slow the process of erosion by which this meander loop immediately north of the highway threatens to break through and cut a new channel along the wheat field bank passing under the west bridge. To

this end, a series of wooden jetties was constructed, each of which extended from the Texas bank diagonally into the river current in an attempt to lessen the severe erosion along the outer edge of the meander loop. Most of these jetties were washed away in a flood in 1957, and have since been replaced from time to time by a series of steel jetties lashed together with wire cables and placed in the water north of the west bridge and along the north edge of the embankment between the two bridges. In addition, stone jetties were built extending into the channel to deflect the water away from the west bridge and embankment and rip rap was frequently dumped on the north edge of the embankment. In July, 1980, many of these jetties were removed by river action, and the embankment was rapidly eroded to a point no more than four feet from the concrete highway surface, requiring emergency dumping of large quantities of stone along the embankment to prevent the cutting of a new channel at that point. In the absence of these continuous bank stabilization projects, it is likely that

a new active channel would have been cut at the approximate location of the west bridge, and that the low water channel would presently be located somewhere on the disputed land, probably along the wheat field bank.

The soil throughout the disputed lands consists of loose sand at least twenty feet deep and is substantially identical to that comprising the bed of the active channel while the soil profile of the wheat field and its bank consists of dark colored sandy loam. The sand bank at the west edge of the present low water channel has no permanence, and yields readily to the action of the water.

In this regard, it appears that a twenty-foot bank created by dredging operations in 1974 along the west edge of the low water channel was almost completely obliterated by 1976. The vegetation which covers most of the disputed lands consists of grasses and weeds, scattered brush, salt cedars and some trees. This vegetation is indistinguishable from that which grows in various places throughout the

riverbed. The vegetation in the riverbed is periodically destroyed by floods or migrations of the active channel, but soon re-establishes itself outside the current active channel. As the active channel has been stabilized in its present location below the bridge for more than forty years, it appears that the vegetation on the disputed lands has been protected by the embankment and supporting stabilization projects and has had an opportunity to grow undisturbed for that period and consequently the trees are larger and the ground cover thicker. The vegetation is sparse to virtually non-existent in the west channel along the wheat field bank, where it is covered by water more frequently.

Upon applying the Oklahoma v. Texas definition of the term "bank" set out at footnote 2 supra to the facts herein as found by the Court, the Court determines that the south (west) boundary bank in this case is the "wheat field bank". Said bank is relatively permanent, particularly in comparison to the bank claimed by Defendants Langford to be the boundary bank, and is part of a

continuous bank on the south (west) side of the Red River which contains the braids of the river and marks the outer limits of the meanderings of the low water channel. It is part of a bank which is washed by the waters of the active channel at several points above and below the disputed lands and serves to confine the waters of the river within the bed and thereby preserve the course of the river. Furthermore, there is evidence before the Court that all of the lower banks lying between the "wheat field bank" and the active channel, including the bank Defendants Langford assert to be the south (west) boundary bank, as well as the disputed land are completely inundated several times a year, even during relatively dry years.³ Also, it appears that an active channel of the Red River actually flowed along the wheat field bank until 1908 when the channel moved eastward approximately one-half of a mile as the result of a major flood. Under these circumstances, the movement of the river was an avulsion and did not effect a change in the boundary line which

remained along the wheat field bank. See Nolte v. Sturgeon, 376 P.2d 616 (Okla. 1962); Mapes v. Neustadt, 197 Okla. 585, 173 P.2d 442 (1946); Goins v. Merryman, 183 Okla. 155, 80 P.2d 268 (1938); Willett v. Miller, 176 Okla. 278, 55 P.2d 90 (1935); Cherokee South Corp. v. Ledford, 603 P.2d 351 (Okla.Ct.App. 1979); State ex rel. Commissioners of the Land Office v. Seelke, 568 P.2d 650 (Okla.Ct.App. 1977); see also R. Musser, Easy Come, Easy Go, or Avulsion Plus Accretion Does Not Equal Revulsion, 48 O.B.A.J. Q-177 (1977). After a further avulsive movement of the channel in 1935, the channel was

artificially confined along the Oklahoma bank and has been stabilized there by the construction of the bridges and related embankment and the continuous bank stabilization projects so that the active water course has been prevented from actually washing the wheat field bank more frequently in recent years and vegetation has been allowed to grow relatively undisturbed on the disputed land.

In summary, the Court finds and concludes that the "wheat field bank" is the south (west) bank of the Red River as defined by Oklahoma v. Texas, supra, 260 U.S. at 636, and thus is the boundary between Oklahoma and Texas. The movement of the active channel away from the "wheat field bank" was primarily the result of an avulsion in 1908 and a further avulsion in 1935. Accordingly, the Court also concludes that the disputed land was not added to the land of Defendants Langford on the south (west) bank of the Red River of accretion or reliction as said Defendants contend.⁴

Turning to the contention of Defendants Langford that they have acquired title to the disputed land by adverse possession, the Court determines that as the land in question is situated on the Oklahoma or north (east) side of the boundary bank, the law of Oklahoma controls the question of adverse possession. Christ Church Pentecostal v. Richterberg, 334 F.2d 869 (Tenth Cir. 1964), cert. denied, 379 U.S. 1000, 85

S.Ct. 719, 13 L.Ed.2d 702 (1965). In this connection, 60 Okla. Stat. 1971 §333 provides:

"Occupation for the period prescribed by civil procedure, or any law of this State as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription which is sufficient against all."

12 Okla. Stat. 1971 §93(4) limits an action for recovery of real property to fifteen years.

In order to establish title to land by adverse possession in Oklahoma, the possession must be open, visible, continuous and exclusive, with claim of ownership such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants. Christ Church Pentecostal v. Richterberg, supra; Douglas-Guardian Warehouse Corp. v. Jordan, 452 F.Supp. 558 (E.D. Okla. 1978); Sears v. Oklahoma, 549 P.2d 1211 (Okla. 1976). The determination of what constitutes adverse possession depends upon the circumstances of each particular case and should take

into consideration the situation of the parties, size and extent of the land, and the purpose of which it is adopted.

Douglas-Guardian Warehouse Corp. v. Jordan, supra; Seigle v. Thomas, 622 P.2d 1076 (Okla. 1981); Sears v. Oklahoma, supra. However, the proof must be clear and positive on the constituent elements of actual, open, notorious, exclusive and hostile possession for the statutory period. Douglas-Guardian Warehouse Corp. v. Jordan, supra; Kouri v. Burnett, 415 P.2d 963 (Okla. 1966); Loris v. Patrick, 414 P.2d 249 (Okla. 1966); Norman v. Smedley, 363 P.2d 839 (Okla. 1961). Every presumption is in favor of a possession in subordination to the rightful owner. Mason v. Evans, 410 P.2d 534 (Okla. 1966); Norman v. Smedley, supra.

In the instant case, the evidence before the Court indicates that around 1968, Defendants Langford constructed a north-south fence across the middle of the disputed land. About the time this fence was built, Defendants Langford began to run cattle in the fenced area east of the wheat field. Also at this

time, Defendants Langford ran some cattle in the portion of the disputed lands east of the newly-constructed fence, but this was discontinued in 1976. Prior to construction of the fence, Defendants Langford allowed their cattle to roam over all of the disputed land and made no effort to keep cattle belonging to other people out of the disputed area. In addition to the foregoing, there is evidence before the Court that Defendants Langford executed oil and gas leases in 1929 and 1977 which may have covered the disputed lands. However, there is no evidence that oil or gas was ever produced pursuant to either lease.

Upon consideration of all of the evidence before the Court, the Court determines that all of the elements of adverse possession have not been established by Defendants Langford by the requisite clear and positive proof. At best, the evidence establishes that the disputed land was subjected to occasional use by Defendants Langford and others for limited grazing purposes to an extent insufficient to establish adverse possession. This use appears to have

been an open range type of use. Use of some of the disputed land by Defendants Langford by grazing cattle thereon under fence was not accomplished for the prescriptive period of fifteen years but only from 1968 to 1975 when Plaintiffs filed this action, a period of only seven years. Furthermore, as there apparently has been no actual production of oil and gas from the disputed land continuing for the fifteen-year statutory period, Defendants Langford have not acquired title by adverse possession of minerals separate from the surface of the disputed land. Mohoma Oil Co. v. Ambassador Oil Corp., 474 P.2d 950 (Okla. 1970); Hassell v. Texaco, Inc., 372 P.2d 233 (Okla. 1962). Therefore, the Court finds and concludes that Defendants Langford have not acquired title to the disputed land, or the minerals underlying the same, by adverse possession under Oklahoma law.

Turning to the claim asserted by the Plaintiffs and Commissioners against the United States to ownership of that part of the river bed lying between the medial line and the south (west) bank of the Red River in Section 13,⁵ the Court

determines that the ownership of the river bed in this area was conclusively established in 1923 by the United States Supreme Court in the Oklahoma v. Texas litigation, supra, wherein the Supreme Court concluded that as to the portion of the Red River located between the 98th meridian of west longitude and the mouth of the North Fork of the Red River,⁶ "[t]he full title and ownership of so much of the bed of the river as lies south of its medial line are in the United States." Oklahoma v. Texas, 261 U.S. 345, 346, 43 S.Ct. 377, 67 L.Ed. 689 (1923); see Bradford v. United States et rel. Department of the Interior, No. CIV-77-0257-D (W.D. Okla., Dec. 8, 1978), appeal docketed, No. 79-1228 (Tenth Cir., Mar. 21, 1979).

Under the general rule in Oklahoma and elsewhere that one is presumed to convey all he owns in a tract of land unless he appropriately reserves in a conveyance thereof some part to himself or there is clear indication of a contrary intention from the terms of the grant and the attendant circumstances, see 16 Okla. Stat. 1971 §29; Whitman v.

Harrison, 327 P.2d 680, (Okla. 1958); Rose v. Cook, 250 P.2d 848 (Okla. 1952); Choctaw and Chickasaw Nations v. Seay, 235 F.2d 30 (10th Cir. 1956), cert. denied 352 U.S. 917, 77 S.Ct. 216, 1 L.Ed.2d 123 (1956), and also because Section 13 was conveyed to Oklahoma as school land, the Plaintiffs and Commissioners urge that the United States conveyed the South half of the Red River bed opposite Section 13 by the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, when it conveyed Section 13 without limiting the south (west) boundary thereof in such conveyance to the medial line of the Red River; that as the United States then owned Section 13 and the land adjoining it to the south (west) bank of the Red River, it being a riparian section, it conveyed all such land in its conveyance to Oklahoma.⁷

However, the United States Supreme Court considered such Act (and presumably the pertinent school land provisions made by the United States Government) in the Oklahoma v. Texas litigation. In that litigation Oklahoma claimed title and ownership from the medial line to the

south bank of the Red River for the entire stretch of the Red River between the 98th meridian and the mouth of the North Fork of the Red River. Plaintiffs and Commissioners who hold under or by conveyance from Oklahoma make the same claim herein as to the river bed opposite Section 13. The claim of Oklahoma in the Oklahoma v. Texas litigation was all inclusive as to the south half of the river bed between the two designated points. Oklahoma's claim was rejected by the United States Supreme Court which found full title and ownership of the river bed south of the medial line to be in the United States (and not in Oklahoma or Texas) between the two designated points. As Oklahoma's claim in that litigation failed so must Plaintiffs' and Commissioners' identical claim made in this litigation as to Section 13 also fail.

Therefore the Court finds the claim of Defendant United States to ownership of the Red River bed from the medial line to the south (west) bank opposite all lands in both Sections 13 and 24 as trustee for certain Indian Tribes to be meritorious.

In view of the foregoing, the Court finds and concludes that the boundary between Oklahoma and Texas in the disputed area involved in this case is along the "wheat field bank" which is the south (west) bank of the Red River in this area; that the land or any part thereof lying between the "wheat field bank" and the present active course of the Red River has not been acquired by Defendants Langford by adverse possession; that the Defendant United States is the owner of the Red River bed from the medial line thereof to the south (west) bank in both Sections 13 and 24; that Plaintiffs are the owners of the surface of the Red River bed from the medial line thereof to the north (east) bank in both Sections 13 and 24; that the intervening Plaintiffs are owners of the minerals in the Red River bed from the medial line thereof to the north (east) bank in Section 24 and the Commissioners of the Land Office, State of Oklahoma, are the owners of the minerals in the Red River bed from the medial line thereof to the north (east) bank in Section 13.

Accordingly, the Court directs Plaintiffs to prepare a proposed Judgment consistent with the foregoing and to circulate the same among the other parties to this case for approval as to form whereupon Plaintiffs are further directed to submit the same to the Court for filing herein within fifteen (15) days from this date.

IT IS SO ORDERED this 19th day of May, 1981.

/s/ Fred Daugherty

FRED DAUGHERTY

UNITED STATES

DISTRICT COURT

FILED

May 19, 1981

Herbert T. Hope

Clerk, U.W. District Court

By /s/ Vera Eddleman

Deputy

2 The parties have agreed herein that the term "bank" in reference to the Red River bank shall mean the bank as defined by the United States Supreme Court in Oklahoma v. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1923). Said case provides in pertinent part as follows:

[T]he bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters, in the periods when they reach and wash the bank without overflowing it. When we speak of the bed, we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys, which have the characteristics of relatively fast land, and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

3 The extensive data in evidence before the Court pertaining to the volume of water discharged by the Red River indicates that the Red River experiences extremely wide yearly, monthly and even daily fluctuations in flow. For example, the mean annual discharge of yearly average flow varies from under 1,000 cubic feet per second to approximately 10,000 cubic feet per second. During periods of normal flow, the discharge has been as low as 200 cubic feet per second to over 33,000 cubic feet per second. During severe flooding such as that experienced in 1935, 1941 and 1957, the discharge rate has exceeded 140,000 cubic feet per second for short periods.

Major floods which overflowed the permanent banks of the Red River and inundated the wheat field occurred in 1935, 1941 and 1957, and the water almost reached the top of the wheat field bank in the fall of 1972. When the discharge rate is between 20,000 cubic feet per second and 30,000 cubic feet per second, almost all of the disputed land is under water and a virtually unbroken expanse of water extends from the Oklahoma bank to the wheat field bank. A discharge rate of 13,000 cubic feet per second or more is sufficient to inundate major portions of the disputed land and has been equalled or exceeded on forty-five days in a flood year, on twenty-five to thirty days in years of high average flow without floods and on ten to fifteen days in years of low average flow. In 1979, the latest year for which full discharge data is available and a year of below average annual flow, substantially all of the disputed land was under water for several days.

5 Plaintiffs and Commissioners do not make this claim as to Section 24 but only claim to the medial line of the Red River opposite Section 24.

6 It is undisputed that Section 13 (and also Section 24) is located between the 98th meridian and the mouth of the North Fork of the Red River.

7 It appears from the Oklahoma v. Texas litigation that the United States Supreme Court reached the conclusion that the United States in its various conveyances of the land north of the Red River and located between the 98th meridian and the mouth of the North Fork of the Red River to Indian Tribes, by allotments to Indians, by patents to white settlers and to Oklahoma when it became a State had demonstrated a clear intention not to convey the south half of the river bed and limited such conveyances to the medial line of the river.

1 This dual terminology is used because generally the Red River runs east and west with north and south banks of the River and the reported cases refer to the north and south banks of the River. However, because of a curve in the Red River in the area involved in this case, the River generally runs north and south and hence we are actually involved with east and west banks in this case.

4 In their proposed findings of fact and conclusions of law filed in this case, Defendants Langford ask the Court to find that the doctrine of acquiescence applies in this case and thereby renders ineffective any avulsion that may have occurred. However, the Court is not persuaded that the doctrine of acquiescence is applicable under the facts of this case as the evicence before the Court does not establish acquiescence by the State of Oklahoma in a long and uninterrupted assertion of dominion and jurisdiction over the disputed areas by the State of Texas. See California v. Nevada, _____ U.S._____, 100 S.Ct. 2064, 65 L.Ed.2d 1 (1980) (boundary acquiesced to by bordering states for more than 100 years); Ohio v. Kentucky, 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560 (1973) (boundary acquiesced to by bordering states for more than 150 years); Arkansas v. Tennessee, 310 U.S. 563, 60 S.Ct. 1026, 84 L.Ed. 1362 (1940) (boundary acquiesced to by bordering states for more than 100 years); Indiana v. Kentucky, 136 U.S. 479, 10 S.Ct. 1051, 34 L.Ed. 329 (1890) (boundary acquiesced to by bordering states for more than 100 years).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 81-2413 (Cross-Appeal)
81-2428 (Cross-Appeal)

DAVID L. JAMES and OLLEN JAMES
Plaintiffs-Appellees and
Cross-Appellants,

BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVALL, Plaintiffs in
Intervention, Appelles,

vs

P.P. LANGFORD, LINDA LANGFORD
(MRS. JERRY G.) MOORE, DESIREE LYNN
LANGFORD, MERISSA LAFAWN LANGFORD,
SHIRLEY LANGFORD, Defendants-Appellants
and Cross-Appelles,

UNITED STATES OF AMERICA,
Defendant and Cross-Appellee,

COMMISSIONERS OF THE LAND OFFICE,
STATE OF OKLAHOMA,
Defendants and Cross-Appellants.

PETITION FOR REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellant Procedure P.P. Langford, et al, the above named defendants and appellants, respectfully petition the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition appellant represents to the Court as follows:

1. The Court overlooked the issue presented by appellants as to whether or not the State of Texas was a necessary party to this litigation. In support thereof, appellants would respectfully urge this Honorable Court to reconsider the argument set forth in appellants' original brief.

2. The Court misapprehended appellants' arguments concerning the Doctrine of Acquiescence.

3. The Court overlooked the issue and misapprehended the law as to what law should apply in the instant case regarding the question of whether or not there was an avulsion; Federal law versus

Oklahoma State law. Federal law should be applied to those rivers which are interstate boundaries, and if so, a different result would be reached in the instant case. Appellants would respectfully request that this Honorable Court reconsider the arguments in support thereof advanced in the original brief on this point.

4. The Court misapprehended the presumption that a river moves by accretion and not by avulsion. An avulsion must be proved by clear and convincing evidence, and the burden of proving the same is on the party asserting changes.

5. In determining whether or not there was an avulsion the Court overlooked the evidence presented by appellants refuting appellees' claim. This point is fully argued in the brief of appellants in connection with Issue No. 4 and this Honorable Court is urged to reconsider those arguments. What happened was simply a rapid erosion and not an avulsion. Appellants would urge that the report of the Boundary

Commission in the Oklahoma v. Texas case (adopted by the Supreme Court) is more compelling than the testimony of Mr. Caroland.

6. The Court overlooked the holding of the Supreme Court in the Case of Oklahoma v. Texas. The bank required by that opinion is the lowest bank, however, the trial court and this Honorable Court have selected the highest bank. The Court in the Oklahoma v. Texas case specified that the water must "reach and wash the bank without overflowing it". If the "wheatfield bank" were the boundary bank, the lower bank and all other banks in the vicinity would be overflowed when the water washed that higher bank. This is contrary to the court's definition. Appellants would urge most strongly that this Honorable Court reread appellants' argument in support of Issue No. 5 and in connection therewith the article by Arthur Stiles, The Gradient Boundary-The Line Between Texas And Oklahoma Along The Red River.

7. The Court overlooked the facts and misapprehended the law regarding the

effect of the construction of the Highway 79 bridge and bank stabilization work. Whether the flow of the water was natural or affected by artificial means is immaterial.

Wherefore P.P. Langford, et al, Appellants, pray that a rehearing be granted and that upon rehearing granted this Court's opinion dated February 28, 1983, be withdrawn and the Court enter a new opinion overruling the judgment of the District Court.

Dated March 23, 1983.

MITCHELL & PAUL
Attorney-at-Law
P.O. Box 549
Henrietta, Texas
76365
817-538-4363

By

Robert F. Mitchell
Attorney for
Appellants

FILED
United States Court of Appeals
Tenth Circuit
March 24, 1983
HOWARD K. PHILLIPS, Clerk

CERTIFICATE

As counsel for the appellants, I hereby Certify that the foregoing Petition for Rehearing is not frivolous and is presented in good faith and not for delay.

MITCHELL & PAUL
Attorneys-at-Law
P.O. Box 549
Henrietta, Texas
76365
817-538-4363

By Robert F. Mitchell
Attorney for
Appellants
State Bar No. 14219000

CERTIFICATE OF SERVICE

I, Robert F. Mitchell, attorney for appellants herein in the above styled and entitled cause, hereby certify that on the 23rd day of March, 1983, we mailed a copy of the foregoing Petition for Rehearing to each of the attorneys of record in this cause, by mailing the same by ordinary mail, postage prepaid.

MITCHELL & PAUL
Attorneys-at-Law
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76365
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By

Robert F. Mitchell
Attorney for
Appellants
State Bar No. 14219000

APPENDIX D

Article 3 of the Boundary Treaty of 1819, 3 Stat. 252, provides as follows:

Article 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas river shall be

found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims and pretensions, to the territories lying west and south of the above-described line; and in like manner, his Catholic Majesty cedes to the said

United States, all his rights, claims and pretension, to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever.

APPENDIX E

Extract from "Partial Decree Relating to State Boundary, Entered March 12, 1923, in Equity, No. 18, Original", from State of Oklahoma v. States of Texas, United States, Intervenor, 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687, (1923).

(From page 341 of the 261st Volume, official, U.S. Reports.)

It is ordered, adjudged and decreed:

1. The boundary between the States of Oklahoma and Texas, where it follows the course of the Red River from the 100th meridian of west longitude to the eastern boundary of the State of Oklahoma, is part of the international boundary established by the treaty of 1819 between the United States and Spain, and is on and along the south bank of that river as the same existed in 1821, when the treaty became effective, save as hereinafter stated.

2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred.

3. Where, since 1821, the river has cut a secondary or additional channel through adjacent upland on the south side in such a way that land theretofore on that side has become an island, the boundary is along that part of the south bank as theretofore existing which by the change became the northly bank of the island; and where by accretion or erosion

there have been subsequent changes in that bank the boundary has changed with them.

4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future.

5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

6. The boundary between the two States is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it.

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APPENDIX F

OKLAHOMA STATUTORY AND COMMON LAW

OKLAHOMA STATUTORY LAW

Chapter 7, Title 60, entitled "Property", Oklahoma Statutes Annotated, by West Publishing Company, §§335 to 340, inclusive, provide as follows:

§335 Riparian accretions (Page 312)

Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

§§336 Removals in mass may be reclaimed (Page 314)

If a river or stream carries away, by sudden

violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

§337 Islands in navigable streams (Page 317)

Islands and accumulations of land formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary.

§338 Island formed by a new channel (Page 318)

If a stream, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

\$340 Ownership of ancient bed

If a stream forms a new course, abandoning its ancient bed, the owner of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived.

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OKLAHOMA COMMON LAW

Extract from the case of Willett v. Miller, 176 Okla. 278, 55 P.2d 90 (1935), cited in the opinion of the District Court, (see Appendix B, page A).
(From page 279 of the 176th Volume, Okla. official reporter.)

The evidence is less in conflict as to the rapidity of the filling in or building up of the bank on the north side of the river. Some of the witnesses testified that it was

by slow and gradual process so as not to be noticeable at any particular time.

But the evidence as a whole shows that in the course of each recurring flood, where a portion of the south bank of the river was washed away a given distance, when the water receded, the north bank of the river would be found to have moved south a corresponding distance, so that the river bed proper kept a comparatively uniform width.

Both parties rely to some extent upon the provisions of the statutes.

Plaintiff in error quotes sections 8556 and 8557 C.O.S. 1921, [60 O.S.A. §§335 and 336] and contends that section 8556 controls.

Defendants in error quote the above sections, and also section 8561. [60 O.S.A. §340] They contend that section 8557 controls.

Section 8561 does not apply for the reason that it applies only to cases where a stream abandons its ancient course and forms a new course by cutting a completely new channel.

Section 8556 provides:

"Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."

Section 8557, supra, provides:

"If a river or stream carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof."

It appears to be conceded that section 8556, supra, is declarative of the common law. So also is section 8561, supra.

The doctrine of accretion and reliction is well established in the common law and has often been held applicable in the several states.

In *Jefferies v. East Omaha Land Co.*, 134 U.S. 178, 33 L.Ed. 872, it is said:

"Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight - cannot appreciate such subtle increments, as may be seen in the case of gourd, and such like." Blackstone says (2 Com.262): 'And as to lands gained from the sea, either by alluvion by the washing up of sand and earth, so as in time to make terra firma; or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this grain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining'."

Accretion is defined as a gradual increase of land by imperceptible degrees; the gradual and imperceptible accumulation of land, etc., 1 C.J. 730; State of Nebraska v. State of Iowa, 143 U.S. 359, 36 L.Ed. 186. The latter case is cited and relied upon by plaintiff, for it is therein said:

"Frequently, whereabove the loose sub-[page 280] stratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may in one sense of the term, be said that the diminution of the bank is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony; that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing waters, and giving to the stream that color which, in the history of the country, has made it known as the 'muddy' Missouri; and, also that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on

that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matters of increase of bank, always a mere gradual and imperceptible process."

It must therefore be conceded that, notwithstanding the rapid washing away of the south bank of the river by the falling into the river of large portions of the bank, rods in width at a time, if the building up the bank on the north side was by gradual and imperceptible degrees, then the contention of plaintiff must be upheld. But it must be borne in mind that what was said in Nebraska v. Iowa, supra, was based upon testimony, and not upon allegations. For it is therein said: "The case before us is presented on testimony and not on allegation." But what are the facts apparent from that testimony?

In considering that case, then it must be assumed that the evidence there showed a gradual building up on the bank of the river on the west or north side by gradual and imperceptible degrees.

It is true that in the course of the opinion the author says:

"There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process."

The court in using said expression must have meant to confine the application thereof to the facts as shown by the testimony in that case, otherwise the doctrine of avulsion could never apply except in cases where the stream cut through the land to form an entirely new channel and completely abandon the old, so as to leave between a portion of land susceptible of identification as the very soil that was in place before the change of the channel. But the doctrine of avulsion is not so limited.

In City of St. Louis v. Rutz, 138 U.S. 226, the doctrine of avulsion is applied in a case very similar in many respects to the one here under consideration.

In Missouri v. Nebraska, 196 U.S. 23, 49 L.Ed. 372, the Supreme Court of the United States points out that:

"It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed in the law, avulsion."

Therein attention was again called to the quotation from Gould on Waters, par. 159, wherein it is said:

"But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates."

In City of St. Louis v. Rutz,
supra, it is held:

"The sudden and perceptible loss of land" of a riparian proprietor, which is visible in its progress, does not deprive him "of his fee in the submerged land, nor change his boundaries" on the river front "as they existed when the land commenced to be washed away," and, "If the bed of a stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but if the change is by reason of a freshet and occurs suddenly, the line remains as it was originally."

It will thus be seen that doctrine of avulsion applies where the bed of a stream changes suddenly and perceptibly by reason of a freshet as well as where the change is by suddenly cutting a new channel through the land, as in the so-called "ox-bow" cases.

. . . [281] . . .

Cases are cited which seem to hold that before the doctrine of avulsion may be applied in a case where land of one riparian proprietor is, suddenly, by flood water, washed away, and at the same time and by the same means land is formed along the opposite bank and adjacent to the land of the riparian proprietor on that side of the stream, the owner of the land washed away must be able to follow and identify his soil as the identical soil washed away from his premises, and if so he is not able so to do, he must lose. Such is not the true rule. The true rule is that if the change is so sudden that the owner of the land washed away is able to point out approximately as much land added to the opposite bank as he had washed away, the doctrine of avulsion applies, and there is no change in the boundary line. It remains as before, notwithstanding the change in the course of the stream, the center of which formed the boundary line.

It is common knowlege, and common sense teaches, that in such cases particles of soil, sand, gravel, etc., are not carried directly across the current of rapid streams and deposited upon the opposite bank, and for his reason no riparian proprietor could, after a freshet, say with certainty that he could identify the particular particles of soil, sand, and gravel deposited upon the opposite bank of the stream during the freshet as formerly forming a part of his land.

The evidence supports the finding of the trial court that the change in the river bed was by avulsion and not by reliction and accretion.

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Extract from the case of Goins v. Merryman, 183 Okla. 155, 80 P.2d 268 (1938), cited in the opinion of the District Court, (see Appendix B, page A).

(From page 157 of the 183rd Volume, Okla. State official reporter.)

1. The defendants Goins and Perrymores have appealed to this court and raised the first question for our determination: Was the land involved in this action formed by accretion or avulsion? The law regarding this question is clearly established and prescribed in this state by statutes, which are declaratory of the common law. Section 11731. O.S. 1931, [60 O.S.A. §335] provides:

"Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the land."

Section 11732, O.S. 1931, [60 O.S.A. §336] provides:

"If a river or stream carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the

same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof."

The former section defines what is commonly known as accretion and the latter section defines what is commonly known as avulsion. It is also clearly established that the test for determining if the change in the river is gradual and imperceptible is that "though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." 9 C.J. 195; County of St. Clair v. Lovington, 23 Wall. 46, 23 L.Ed. 59; Jefferies v. Land Co. 134 U.S. 178, 10 S.Ct. 518, 33 L.Ed. 872; State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186. Thus, in order to constitute accretion it is not necessary that the change be imperceptible between two distinct points of time. Yuttermen v. Grier (1914, Ark.) 166 S.W. 749.

It is been held that in order to constitute avulsion there must be a detachment of earth from one side of the river and a deposit of the same earth on the other side of the river in such a manner that it can be identified as the land of the other owner. State of Nebraska v. State of Iowa, *supra*; McCormack v. Miller (Mo.) 144 S.W. 101; Yuttermen v. Grier, *supra*. But, contrary to these holdings the statute regarding avulsion in this state has been relaxed by judicial construction in the case of Willett v. Miller (1936) 176 Okla. 278, 55 P.2d 90. The rule is stated as follows:

"Where a nonnavigable stream is the boundary line between riparian owners, and by a sudden freshet or flood a considerable area of land belonging to one owner is washed away by the current of the river and at the same time land is formed on the opposite bank of the stream in approximately the same area, the doctrine of avulsion applies and there is no change in the boundary line. It remains at the place where the

middle of the main channel of the stream was before the freshet or flood."

Although it is noted the statute provides that if the river carries away, by sudden violence, "a considerable and distinguishable part of a bank, and bears it to the opposite bank," thus indicating that it must be capable of being identified, yet in Willett v. Miller, supra, the court said:

"Cases are cited which seem to hold that before the doctrine of avulsion may be applied in a case where land of one riparian [page 158] proprietor is suddenly, by flood water, washed away, and at the same time by the same means land is formed along the opposite bank and adjacent to the land of the riparian proprietor on that side of the stream, the owner of the land washed away must be able to follow and identify his soil as the identical soil washed away from his premises, and if he is not able so to do, he must lose. Such is not the true rule. The true rule is that if the change is so sudden that the owner of the land washed away is able to point out approximately as much land

added to the opposite bank as he had washed away, the doctrine of avulsion applies, and there is no change in the boundary line."

In the case the trial court found that the Arkansas river was navigable at the point of the location of these lands. It is immaterial, however, whether the river or stream is navigable or non-navigable, as the same principles apply to each. State of Nebraska v. State of Iowa, *supra*.

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Extract from the case of Mapes v. Neustadt, 197 Okla. 585, 173 P.2d 442 (1946), cited in the opinion of the District Court, (see Appendix B, page A).

(From page 443 of the 173 2d Volume, Pacific Reporter.)

"...In all of the cases cited by either of the parties it appears that any movement of the streams in question was by

slow and imperceptible degrees over a long period of time and clearly amounted to what was known at common law and is defined by our statute, supra, as accretion. By the common law any sudden change in the channel of stream or movement of one mass of land from one shore to another, where it was identifiable, was avulsion and did not affect titles nor change boundaries, 67 C.J. 828, sec. 239, and the cases cited in the footnotes. Our statutory definition of avulsion is not as broad as the common law definition and is limited solely to the right to reclaim mass removals that can be identified subsequently, 60 O.S. 1941 §336.

. . . . [444]. . . .

We think that the reliance of Neustadt . . . upon the ability to identify his land by government plat and survey following the restoration of land justified the trial court in rendering judgment in his favor. There is sharp diversity of views among the opinion of the courts of this nation on the subject of accretion and the rule adopted by the South Dakota court in Allard v. Curran, 41 S.D. 73, 168 N.W. 761, followed by the later case of Erickson v. Horlyk, 48 S.D. 544, 205 N.W. 613, where the chief reliance for the rule adopted therein was upon the ability to identify according to government plat and survey was the basis for the Hunzicker case. We believe it controls here.

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Extract from the case of Nolte v. Sturgeon, (Okla.) 376 P.2d 616, (1962), cited in the opinion of the District Court, (see Appendix B, page A).

(From page 620 of the 376 2d Volume, Pacific Reporter.)

The test for determining whether changes are accretion or avulsion is stated in the second paragraph of the syllabus of Goins v. Merryman, 183 Okla. 155, 80 P.2d 268:

"In determining if a change in the course of a river is by accretion or avulsion, the test is not whether the witnesses may see, from time to time that progress has been made, but whether they could perceive the change while it was going on."

The Goins case, supra, was a law action wherein we stated that the judgment finding accretion would not be reversed if there was any competent evidence reasonably tending to support it. We then said:

" * * * The evidence on the whole shows that during the 30 years within which the change took place the river would regularly rise, the land be flooded for a few days, during which time the north and east bank would cave away, and as the water subsided the course of the river would have moved slightly in that direction. Also by such process the evidence shows that land was deposited on the south and west sides of the river in approximately the same quantity so that the width of the river bed was substantially the same. We find no testimony to the effect that any person saw the banks cave away or perceived the changing process while in progress. On the other hand, a great number of witnesses testified that the change in the course of the river was gradual. * * *

As may be seen, the testimony in that case showed an imperceptible [emphasis not added] change.

• • •

Plaintiffs in error emphasize the testimony of the various witnesses who state that the land particles which washed away from the south bank cannot be

identified as the same land particles that were deposited on the north bank. They indicate that such identification is a requirement of proof before a finding of avulsion may be made. A similar argument was made and answered in Willett v. Miller, 176 Okl. 278, 55 P.2d 90:

"Cases are cited which seem to hold that before the doctrine of avulsion may be applied in a case where land of one riparian proprietor is, suddenly, by flood water, washed away, and at the same time and by the same means land is formed along the opposite bank and adjacent to the land of the riparian proprietor on that side of the stream, must be able to follow and identify his soil as the identical soil washed away from his premises, and if he is not able so to do, he must lose. Such is not the true rule. The true rule is that if the change is so sudden that the owner of the land washed away is able to point out approximately as much land added to the opposite bank as he had washed away, the doctrine of avulsion applies, and there is no change in the boundary line. It remains as before, notwithstanding the change in the course of the stream, the center of which formed the boundary line.

"It is common knowledge, and common sense teaches, that in such cases [621] particles of soil, sand, gravel, etc., are not carried directly across the current of rapid streams and deposited upon the opposite bank, and for this reason no riparian proprietor could, after a freshet, say with certainty that he could identify the particular particles of soil, sand, and gravel deposited upon the opposite bank of the stream during the freshet as formerly forming a part of his land."

The recent case of *Buchheit v. Glasco*, Okl., 361 P.2d 838, was a case where a flood of 1904 caused land previously forming the west bank of the South Canadian river to become part of the river bed, but where no accompanying change was made in the east bank; thus, in effect, the river merely widened itself. Such a case is distinguishable from the instant case because of those facts, but the same rule of law as to avulsion was said to be applicable. We said there:

The authorities appear to be in agreement on the proposition that the doctrine

of avulsion is only applicable where the loss of land is sudden and perceptible. See Goins et al v. Merryman et al., 183 Okl. 155, 80 P.2d 268; Chase et al. v. Cheatham et al., 194 Okl. 1, 146, P.2d 585; State ex rel. Comm'rs. of Land Office v. Warden et al., supra; City of St. Louis v. Rutz, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941, and 56 Am.Jr. 'Waters', Sec. 476, P.891."

Plaintiffs in error attempt to further distinguish the Buchheit case, supra, because the river in that case was changed by avulsion only once, whereas in this case there have been numerous floods and consequent perceptible changes over the years. Such a distinction may not be made. Each separate "sudden and perceptible" change or loss of land is avulsion.

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Extract from the case of State ex rel. Com'rs of land Office v. Seelke, (Okl.) 568 P.2d 650, (1977), cited in the opinion of the District Court, (see Appendix B, page A).

(From page 653 of the 568 2d Volume, Pacific Reporter.)

The distinction between accretion and avulsion was summarized by the Supreme Court in Olsen v. Jones, 412 P.2d 162, 163, wherein the court held:

Syllabus by the Court

1. Accretion denotes the process by which the area of owned land is increased by the gradual deposit of soil due to the action of a bounding river or other body of water. Accretion occurs when the change in the river is gradual and imperceptible. The gradualness of the process distinguishes accretion from the more rapid, easily perceived, and sometimes violent, shifts of land incident to floods, storms or channel breakthroughs known as avulsion.

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Extract from the case of Cherokee South Corp. v. Ledford, (Okl.) 603 P.2d 351, (1979), cited in the opinion of the District Court (see Appendix B, page A).

(From page 352 of the 603 2d Volume, Pacific Reporter.)

The primary distinction between accretion and avulsion, and the only one that matters here,² is whether the shift was gradual or sudden. The line between gradual and sudden is hardly precise and the case law does not reflect ease of application.

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APPENDIX G

FEDERAL DECISIONAL LAW CONSTRUING
THE FEDERAL BOUNDARY TREATY LAW ON
RED RIVER

Extract from United States v. Texas,
162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867,
(1896).

(From page 90 of the 162 Volume, official,
U.S. Reports.)

For the reasons stated the
United States is entitled to
the relief asked. And this
Court now renders the following
decree:

This cause having been
submitted upon the pleadings,
proofs and exhibits, and the
court being fully advised, it
is ordered, adjudged and
decreed that the territory east
of the 100th meridian of
longitude, west and south of
the river now known as the
North Fork of Red River, and
north of a line following

westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red River and of the river now known as the Prairie Dog Town Ford or South Fork of Red River until such line meets the 100th meridian of longitude--which territory is sometimes called Greer County--constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America. Each party will pay its own costs.

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Extract from Oklahoma v. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428, (1923).

(From page 636 of the 260th Volume, official, U.S. Reports.)

The boundary as it was in 1821, when the treaty became effective, is the boundary of today, subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes. Of those doctrines this Court recently said:

It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an

avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel." Arkansas v. Tennessee, 246 U.S. 158, 173. [Emphasis added to text.]

Oklahoma and the United States question the applicability of the doctrine of erosion and accretion to this river, particularly the part in western Oklahoma--and [637] this because of the rapid and material changes effected during rises in the river. But we think the habit of this river is so like that of the Missouri in this regard that the ruling relating to the latter in Nbraska v. Iowa, 143 U.S. 359, 368 is controlling. It was there said, p. 368, et seq.: [Emphasis added to text.]

The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand.

. . . The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible . . . No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and

water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this is itself caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the [638] washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States. [Emphasis added to text.]

Common experience suggests that there probably have been changes in this stretch of the

Red River since 1821, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old. . . .

[639] . . . The habit of the river is to erode the outer bank of a bend and to accrete to the opposite bank.

. . . [640] . . .

There are instances in which the river since 1821 has in time of flood left its former channel and cut a new one through a neck of land thereby causing land theretofore on one side of the river to be on the other. Such avulsive action does not carry the boundary with it, but leaves it where it was before.

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APPENDIX H

Extract from Cissna v. Tennessee,
246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720,
(1918).

(From page 296 of the 246th Volume,
official U.S. Reports.)

The remaining error arose
in the determination of the
consequences of the avulsion of
1876. It is a part of the law
of interstate boundaries, that
where a running stream forms
the boundary, if the bed and
channel are changed by the
natural and gradual processes
of erosion and accretion, the
boundary follows the varying
course of the stream; while if
the stream suddenly leaves its
old bed and forms a new one,
the resulting change of channel
works no change of boundary,
which remains in the middle of
the old channel although no
water be flowing in it.

Arkansas v. Tennessee, supra.
A correct application of this
rule to changes in the
Mississippi is necessary in
order that proper effect may be
given to the treaties and acts
of Congress by which that river
was established as an
interstate boundary, and hence
this is a question of federal
law. [Emphasis added.]

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NOV 4 1983

ALEXANDER L. STEVAS,
CLERK

No. 83-542

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

P. P. LANGFORD, LINDA LANGFORD
(MRS. JERRY G.) MOORE, DESIREE LYNN
LANGFORD, MERISSA LAFAWN LANGFORD,
SHIRLEY LANGFORD,

Petitioners,

VS.

DAVID L. JAMES AND OLLEN JAMES;
BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVEALL; COMMISSIONERS
OF THE LAND OFFICE, STATE OF OKLAHOMA;
UNITED STATES OF AMERICA,

Respondents.

BOUNDARY SUIT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
TENTH DISTRICT

VOLUME TWO — APPENDIX

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Counsel for Petitioners

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-75-461-D

DAVID L. JAMES and OLLEN JAMES,
Plaintiffs,
BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVALL,
Intervening Plaintiffs,
vs
P.P. LANGFORD, LINDA LANGFORD
(MRS. JERRY G.) MOORE, DESIREE LYNN
LANGFORD, MERISSA LAFAWN LANGFORD,
SHIRLEY LANGFORD, and
THE UNITED STATES OF AMERICA and
THE COMMISSIONERS OF THE LAND OFFICE,
STATE OF OKLAHOMA,
Defendants.

JUDGMENT

This declaratory judgment action to quiet title to real property lying in the bed of the Red River between Jefferson County, Oklahoma, and Clay County, Texas. The Court has subject matter jurisdiction of the cause pursuant to 28 U.S.C. §1332 by reason of diversity of citizenship and amount in controversy, and over the United States of America pursuant to 28 U.S.C. §§1334(f) and 2409a. Additional parties were properly joined by reason of their ownership of interests in the lands involved. An extensive non-jury trial has been conducted herein, and the Court filed its memorandum opinion on May 19, 1981.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the boundaries between the lands owned by the parties hereto, the respective rights of the parties, and the ownership of the lands involved herein, are declared and determined to be as set out below:

1. The boundary between Oklahoma and Texas, as fixed by the Treaty of 1819

between the United States and Spain, is the south (here west) bank of the Red River. The cut bank along the southerly (westerly) side of the sand bed constitutes the south (west) bank of the river; and the boundary is on and along that bank at the mean lever of the water when it washes the bank without overflowing it. The boundary is as it was in 1821, subject to the right application of the doctrines of erosion and accretion, and of avulsion. Oklahoma v. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1923).

2. The boundary here in dispute lies between a portion of the Reuben Brown survey on the Texas side, and Sections 13 and 24, Township 5 South, Range 9 West of the Indian Meridian on the Oklahoma side. The south (west) boundary bank of the Red River at this location is the bank referred to throughout the litigation as the "wheat field bank", a pronounced bank or acclivity which runs roughly north and south along the eastern edge of the lands

in the Reuben Brown survey which have been under cultivation for many years.

3. The defendants, P.P. Langford, Linda Langford (Mrs. Jerry G.) Moore, Desiree Lynn Langford, Merissa LaFawn Langford, and Shirley Langford, are the owners in fee simple of the lands in the State of Texas, comprising a portion of the Reuben Brown Survey, to the west of the boundary bank described in Paragraph 2 above; and the wheat field bank constitutes the eastern boundary of their lands.

4. The bed of the Red River north (east) of the boundary bank constitutes lands located in the State of Oklahoma, and lands riparian to Sections 13 and 24, Township 5 South, Range 9 WIM, and is owed as follows:

(a) That portion of the river bed lying north (east) of the boundary bank described above, and south (west) of the medial line of the river bed is owned in fee simple by the United States of America.

(b) That portion of the river bed lying north (east) of the medial line is owned in fee simple by plaintiffs David L. James and Ollen James, less and except all oil and gas and other such minerals in and under and which may be produced therefrom, which are owned as follows:

(c) All oil and gas and other such minerals in that portion of the bed of the Red River north (east) of the medial line in Section 13, Township 5 South, Range 9 WIM, are owned by the State of Oklahoma, Commissioners of the Land Office.

(d) All oil and gas and other such minerals in that portion of the bed of the Red River north (east) of the medial line in Section 24, Township 5 South, Range 9 WIM, are owned by intervening plaintiffs Bruce Wright, Mary Ben Wright and Anna Mae Stovall.

5. The title of the respective parties to their respective lands and interests as set out in the preceding paragraph is adjudicated, and forever quieted and confirmed.

6. The boundary lines established by this order shall hereafter be subject to proper application of the doctrines of erosion and accretion, and of avulsion, all as described in Paragraph 1 above.

7. The Court retains jurisdiction for a period of six months after the date this Judgment becomes final, within which time a motion of any party to order or approve a field survey of boundary lines described herein will be entertained, or a stipulation thereon approved. In the event of any such motion, such further proceedings shall be conducted, and such further orders entered as to the precise location of the boundary lines pursuant to a field survey as the Court shall deem appropriate.

Dated this 19th day of June, 1981.

/s/ Fred Daugherty
FRED DAUGHERTY
UNITED STATES
DISTRICT JUDGE

APPROVED:

/s/ Charles Nesbitt
Attorney for Plaintiffs

/s/ Roland Tague
Attorney for Defendants

/s/ James F. Howell (AE)
Attorney for Intervening
Plaintiffs

/s/ John E. Green
Attorney for United States
of America

/s/ R. R. Williamson (AE)
Attorney for State of
Oklahoma,
Commissioners of the Land
Office

FILED
June 19, 1981
Herbert T. Hope
Clerk, U.S. District
Court

By /s/ Vera Eddleman
Deputy

OCT 31 1983

NO. 83-542

SUPREME COURT OF THE UNITED STATES

ANDER L STEVAS,
CLERK

OCTOBER TERM 1983

P. P. LANGFORD, LINDA LANGFORD
(MRS. JERRY G.) MOORE, DESIREE LYNN
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VS.

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BRUCE WRIGHT, MARY BEN WRIGHT and
ANNA MAE STOVALL; COMMISSIONERS
OF THE LAND OFFICE, STATE OF OKLAHOMA;
UNITED STATES OF AMERICA,

Respondents.

DISPUTE BETWEEN LANDOWNERS ON
OPPOSITE SIDES OF A RIVER AS TO
THE BOUNDARY BETWEEN THEIR LANDS

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS TENTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Counsel for Appellees
DAVID L. JAMES and
OLLEN JAMES

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AUTHORITIES PRESENTED

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P. P. LANGFORD, LINDA LANGFORD
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DAVID L. JAMES and
OLLEN JAMES

I

STATEMENT OF THE CASE

This is a dispute between landowners as to the precise location of the boundary between their respective lands. The land in controversy comprises the river bed of the Red River. Although the river also marks the boundary between Oklahoma and Texas, this is not a dispute between States as to a state boundary.

The disputed land is located within that stretch of the Red River where the Supreme Court has held that land riparian to the Red River on the Oklahoma side extends to the Medial line (halfway between the Oklahoma bank and the Texas bank); riparian land on the Texas side extends only to the Texas bank; and the United States owns the river bed between the Medial line and the Texas bank. (Okla-

homa vs. Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771).

Respondents James own surface rights in part of two sections of land in Jefferson County, Oklahoma, which abut the Red River. Petitioners Langford own lands in Clay County, Texas, abutting the river on the opposite side. The State of Oklahoma ex rel Commissioners of the Land Office, and Intervenors Wright et al own mineral rights under James' land. The United States claimed the strip comprising the south half of the river bed.

From the outset, there was no dispute whatever as to the governing legal principles. The boundary between Oklahoma and Texas, and in turn the boundary between private owners under grants from the respective states, lies along the south (Texas) bank of the Red River. (Oklahoma

vs. Texas, 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831; See Appendix p. 16). The location of that bank in turn dictates the location of the Medial line.

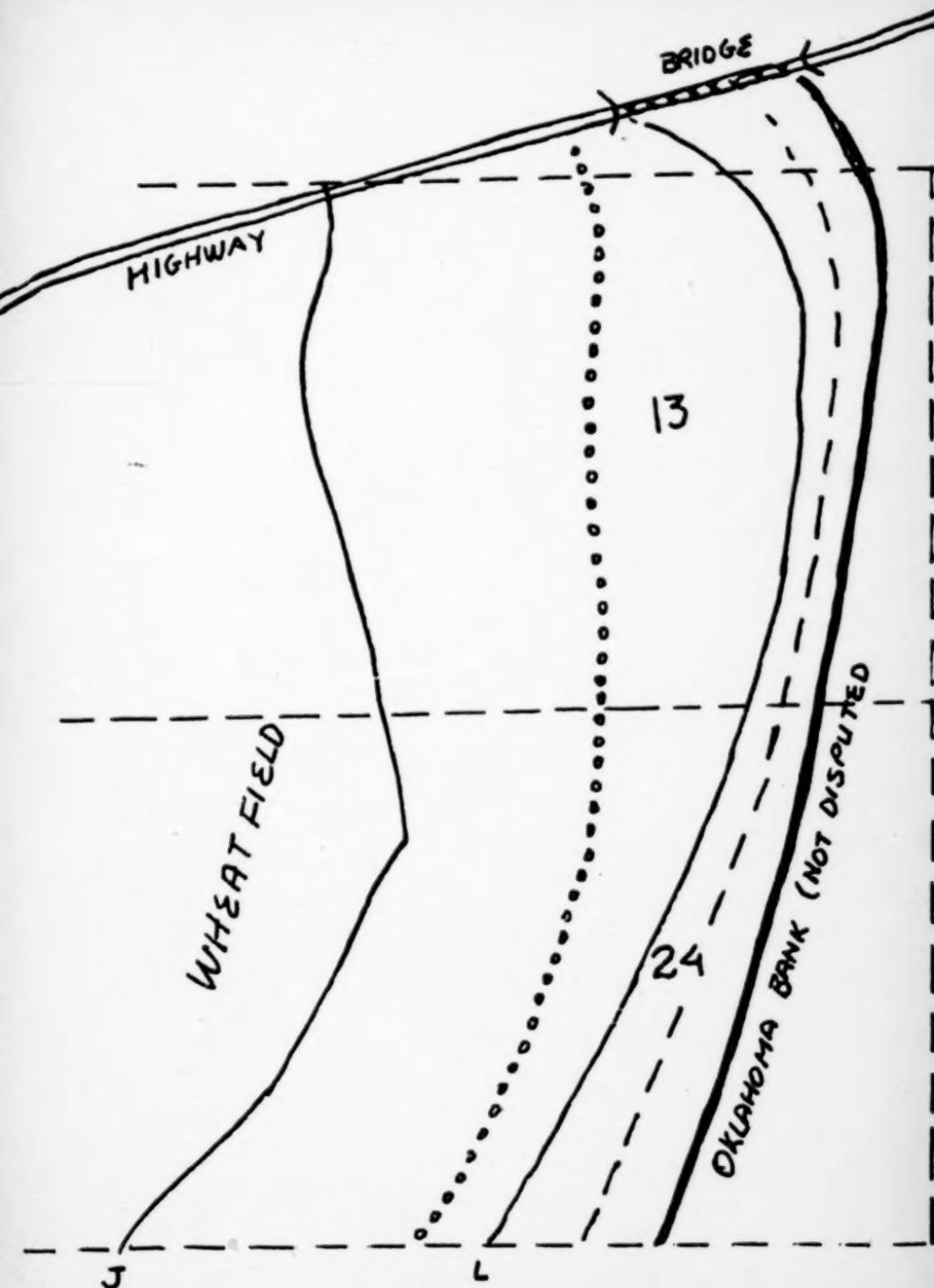
Moreover, there was no dispute as to the standard to be applied in arriving at the location of the boundary bank.

(Oklahoma vs. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428; See Appendix p.42). The only issue was one purely of fact: which of several possible choices constituted the correct boundary bank at that point.

The Red River is typical of rivers crossing the more arid Southwest. Unlike an Eastern river, which normally flows substantially bank-full in a well defined channel, the Red River consists of a broad sand-filled bed between well defined outer banks, over which a narrow low water chan-

nel meanders irregularly. (See Appendix pp. 20 et seq). The river utilizes the area between the outer banks in two ways: the low water channel tends to change location rapidly and frequently, so that over a period of years it will successively occupy all points in the river bed; and due to extreme variations in rate of flow, the river occupies the entire bed between the outer banks during substantial high water periods each year. (See Appendix pp. 20, 43).

The issue between the parties was which of two possible banks best fulfilled the definition of the Texas boundary bank as promulgated in Oklahoma vs. Texas, supra. As shown in the accompanying sketch, the low water channel runs along the Oklahoma bank in the disputed area. Langfords asserted that the low sand bank at the edge of the low water channel is



- J — James' West (Texas) Bank
(Wheatfield Bank)
- L — Langford West (Texas) Bank
- Langford Medial Line
- ooo James Medial Line

the boundary bank; James contended that the permanent bank along the edge of the cultivated wheatfield was the correct boundary.

The District Court conducted a lengthy non-jury trial on the issue, at the conclusion of which it determined that the wheatfield bank is the one which fits the Oklahoma vs. Texas definition. It is relatively permanent, in comparison to the transitory sand bank along the edge of the low water channel; it is part of a continuous bank which contains the braids of the river and marks the outer limits of the meanderings of the low water channel; and it is part of the bank which is washed by the waters of the active channel at multiple points. All of the disputed land below the wheatfield bank is completely inundated several times a year, even during relatively dry years. (558

F. Supp. at 743; Appendix p. 29). The soil in the bed below the wheatfield bank is loose sand, like that in the low water channel. The vegetation is indistinguishable from that which grows throughout the river bed; although periodically destroyed by floods. The 1861 Survey by the State of Texas, the basis of Langfords' title, extended only to the wheatfield bank.

The District Court also applied another principle of law enunciated in Oklahoma vs. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428, that the boundary today is the boundary as it existed in 1821, subject to the doctrines of erosion, accretion and avulsion. Langfords asserted that the disputed area was added to their lands by accretion. The low water channel ran along the wheatfield bank until 1908, when as a result of a major flood, it suddenly moved

about a half mile eastward.

The District Court rejected Langford's accretion claim. The disputed land could not have accreted to Langfords' land because it is not fast land. The river often occupies the entire bed below the wheatfield bank in periods of greater flow short of flood. The designation of the wheatfield bank as the boundary meant that all of the disputed lands lie in the river bed itself. Accordingly, any movement of the low water channel, avulsive or otherwise, within the river bed causes no change in the boundary. Even so, the undisputed evidence established that the movement of the low water channel from its original position along the wheatfield bank was avulsive in character. Thus, even if the edge of the low water channel had been chosen as the boundary, it would remain along the wheatfield bank in any

event because of the avulsive nature of the movement of the channel from that location.

Upon appeal perfected by the Langfords, the Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court, holding that the decision simply required an application of the legal principles enunciated in Oklahoma vs. Texas, supra; that the District Court applied the correct principles, and applied them correctly. (701 F.2d at 126, Appendix p. 10). In a clarifying statement, the appeals court noted that the decision was limited to adjudicating private rights, and was not a determination of a boundary between states.

REASONS FOR DENIAL OF CERTIORARI

None of the reasons specified in Rule 17 justifying grant of Certiorari

exists in this case. Nor does there exist any reason of similar nature or of comparable importance. No conflict has arisen between decisions of Federal Courts of Appeals on any issue in this case, or between state and federal courts. There is no such conflict with any decision of this Court. The decision in the District Court and in the Court of Appeals specifically applied and followed the doctrines enunciated in the governing decision by this Court.

This case raises no question of law of sufficient importance as to require a grant of certiorari. This is not to minimize the importance of the case to the parties litigant. It involves ownership of private lands which are valuable and important to each of the claimants. However, there is presented no legal issue which is so new or so novel as to command

review by this Court.

Once a governing principle of law has been promulgated in a decision of this Court, it is for the District Court to apply that principle to the facts of individual cases. It is a proper role of the Court of Appeals to review the decision of a District Court upon disputed issues of fact. Each of those Courts correctly identified the issues and properly carried out its adjudicative responsibility. Hence, under no circumstances can it be asserted that either court so departed from traditional procedure as to call for exercise of this Court's power of supervision.

This case does not involve an "interpretation" of the treaty of 1819. That treaty established the boundary between lands riparian to the Red River, to be the Texas bank of the river. No party

has contended to the contrary. A suit to determine precisely where that bank is located does not involve an interpretation of the treaty.

The standard to be applied in identifying the boundary bank at any particular location is enunciated in Oklahoma vs. Texas, supra (260 U.S. 606) as:

"the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river..."

Petitioners contend the District Court applied the Oklahoma vs. Texas doctrine in such a way that "there could be no adjacent upland" (or lateral valley). The assertion is simply untrue. As the District Court said, (558 F.Supp. at 741):

"To the west of the wheat field is another prominent bank characterized by an outcropping of bedrock rising

some twenty feet above the wheat-field..."

It is clear that the District Court concluded that the wheat field constituted the "lateral valley" which may (but not necessarily does) lie between the boundary bank and the outer edge of the river valley. This bank does not constitute the range of hills fringing the outer edge of the river valley which was found not to constitute the boundary in Oklahoma vs. Texas (260 U.S. at 625).

Petitioners appear to assert some error relating to the gradient boundary survey, (Petition, p.11) referred to in the Oklahoma vs. Texas case (See 265 U.S. 500, 44 S.Ct. 573, 68 L.Ed. 1121). The gradient boundary technique arose out of that part of the decision which designated the actual boundary to be on the Texas bank at mean water level, that is, halfway

between the low water and high water stages. The difficulty in making that measurement upward from a descending water line on a bank that widely varies in height required the invention of a highly specialized survey method. Here, the District Court designated the correct bank, and in its judgment made proper provision for establishing the boundary line on that bank, either by stipulation or court-supervised survey.

The only specific complaint voiced by Petitioners is that the Court of Appeals described the boundary (wheatfield) bank as being three to four feet high, whereas the District Court more accurately described that bank to be approximately ten feet high. In spite of the slight discrepancy, it is clear that both courts were referring to the same bank, and that the Court of Appeals found the District

Court's application of the Oklahoma vs. Texas doctrine to the evidence in this case to have been correct.

The case of Cissna vs. Tennessee, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720 provides no grounds for grant of certiorari. That case was a companion case to Arkansas vs. Tennessee, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1918), a boundary dispute between States over lands in the bed of the Mississippi River, a navigable river, owned by the States in sovereign capacity. By contrast, the Red River is not navigable. (Oklahoma vs. Texas, 258 U.S. at 591). A Tennessee court had held that an avulsion restored the boundary to its location prior to a long process of erosion which preceded the avulsion, contrary to Nebraska vs. Iowa, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186 and Missouri vs. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372.

The boundary dispute between sovereign states, together with the decision by a state court in conflict with the rule in such cases enunciated by the Supreme Court, would justify exercise of appellate jurisdiction. No such grounds exist here.

The doctrine of avulsion was not essential to the decision in this case; for the reason that the bank at the outer edge of the river bed marks the boundary, so that movement of the low water channel, avulsive or otherwise, has no effect on the boundary. In any event, state law governs the determination of rights of owners riparian to a non-navigable river forming a state boundary, Oregon vs. Corvallis Sand and Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550. Where the United States owns or claims land involved in the dispute, federal law governs the substantive aspects of the

case, but should incorporate the applicable state property law to resolve the dispute. Wilson vs. Omaha Indian Tribe, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153.

Langfords contend that an avulsion can occur only when an identifiable tract of land is cut off (the so-called ox-bow case). Under both the federal rule and the Oklahoma rule, an avulsion also includes a sudden, perceptible change of channel, within or without the river's original bed, such as caused by a flood. City of St. Louis vs. Rutz, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941; Omaha Tribe vs. Wilson, CA8, 1978, 575 F.2d 620; Veatch vs. White, CA9, 1927, 23 F.2d 69; Ulhorn vs. U.S. Gypsum Co., CA8, 1966, 366 F.2d 211; Willett vs. Miller, Okl. 1935, 55 P.2d 90; Nolte vs. Sturgeon, Okl. 1962, 376 P.2d 616; State vs. Seelke, Okl. 1977,

568 P.2d 650. Since the land in controversy was in Oklahoma prior to movement of the watercourse, Oklahoma law would govern whether ownership changed thereby. Langfords have never contended otherwise.

Thus, even if the decision had depended entirely upon application of the law of avulsion, the rule applied by the District Court was the correct rule under either federal or state law.

CONCLUSION

In summary, this case presents no conflict in court decisions, and no issue of federal law justifying a grant of certiorari. For these reasons, it is respectfully submitted that the Court should refuse to grant a writ in this case.

Because of identity of interest,

Respondents (Intervenors) Bruce Wright,
Mary Ben Wright and Anna Mae Stovall join
in this Response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, certifies that on the _____ day of _____, 1983, he deposited three copies of the attached Brief in Opposition to Petition for Writ of Certiorari in the U.S. Mail at the U.S. Post Office, Oklahoma City, Oklahoma with first class postage pre-paid thereon, addressed to each of the following counsel at the address shown:

CHARLES NESBITT

Subscribed and sworn to before me this _____ day of _____, 1983.

Notary Public

My Commission Expires: 12-7-85

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DEC 5 1983

No. 83-542ALEXANDER L. STEVAS,
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1983

P. P. LANGFORD, LINDA LANGFORD (Mrs. Jerry G.)
 MOORE, DESIREE LYNN LANGFORD, MERISSA
 LAFAWN LANGFORD, SHIRLEY LANGFORD,
Petitioners,

vs.

DAVID L. JAMES and OLLEN JAMES; BRUCE WRIGHT,
 MARY BEN WRIGHT and ANNA MAE STOVALL;
 COMMISSIONERS OF THE LAND OFFICE,
 STATE OF OKLAHOMA; and UNITED
 STATES OF AMERICA,
Respondents.

DISPUTE BETWEEN LANDOWNERS ON OPPOSITE SIDES OF A
 RIVER AS TO THE BOUNDARY BETWEEN THEIR LANDS

**On Petition for Writ of Certiorari to the
 United States Court of Appeals
 For the Tenth Circuit**

**JOINDER IN BRIEF IN OPPOSITION TO
 PETITION FOR WRIT OF CERTIORARI**

State of Oklahoma, *ex rel.*
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December, 1983

No. 83-542

In the
Supreme Court of the United States

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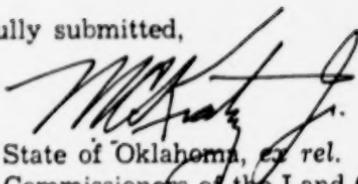
On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit

**JOINDER IN BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

The State of Oklahoma *ex rel.* Commissioners of the Land Office, as mineral owner in the subject property and Respondent in this cause, herewith joins in the Brief in Opposition to the Petition for Writ of Certiorari previously filed by Respondents David L. James and Ollen James, due to identity of interest.

—2—

Respectfully submitted,



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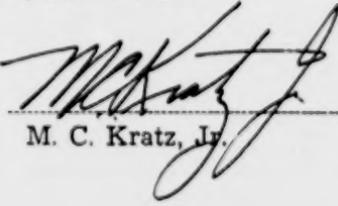
Service of this Joinder Brief in Opposition has been made by placing copies of same, addressed to the counsel or parties listed below, in the U.S. Mail, postage fully paid, this 2nd day of December, 1983.

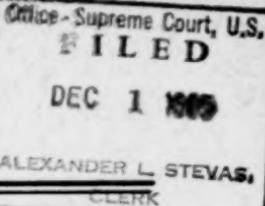
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No. 83-542

In the Supreme Court of the United States

OCTOBER TERM, 1983

P.P. LANGFORD, ET AL., PETITIONERS

v.

DAVID L. JAMES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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**ON PETITION FOR A WRIT OF CERTIORARI TO
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**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioners claim that the court of appeals erroneously applied the decision of this Court in *Oklahoma v. Texas*, 260 U.S. 606 (1923), and the subsequent boundary decrees (261 U.S. 340 (1923), and 261 U.S. 345 (1923)), in rejecting their claim of title to certain land in Texas located along the Red River.

1. Respondents David L. and Ollie James are owners of land in Oklahoma along the Red River (Pet. App. A14-A15). Immediately across the Red River in Texas is land owned by petitioners, the Langfords (*id.* at A16). The boundary between Oklahoma and Texas is the south bank of the Red River. See *Oklahoma v. Texas*, 256 U.S. 70 (1921).

In 1975, the Jameses filed a complaint for declaratory relief, contending that there was a dispute between the two sets of landowners as to the boundary between their lands

and asking the court to determine the exact location of the south bank of the Red River (Pet. App. A17). The United States was named as a party to the suit because of its ownership of certain of the land as trustee for several Indian tribes (*id.* at A16). In its answer, the United States claimed ownership of that portion of the land in dispute located between the medial line of the Red River and the south bank of that river (*ibid.*). Other parties intervened in the suit, claiming ownership of the minerals underlying part of the lands (*id.* at A15).

Following a lengthy bench trial, the district court concluded that (1) the south bank of the Red River was "a well-defined embankment immediately to the east of the presently cultivated lands of Defendants Langford on the Texas side of the river" (Pet. App. A17-A18), which bank is designated as the "wheat field bank" (*id.* at A29); (2) a 1908 change in the course of the river that moved the channel eastward approximately one-half mile was avulsive and therefore effected no change in the boundary between Texas and Oklahoma, which remained along the wheat field bank (*id.* at A30-A31); (3) the Langfords had not, by adverse possession, acquired title to the disputed lands or to the underlying minerals (*id.* at A35-A36); (4) the State of Oklahoma, and thus the Jameses as successors in interest, owned the adjacent bed of the Red River only as far south as its medial line (*id.* at A39); and (5) the United States, by virtue of the decrees in *Oklahoma v. Texas*, 258 U.S. 574 (1922), and 261 U.S. 345 (1923), owns the bed of the Red River from the medial line to the Texas bank opposite the lands of the Jameses in Oklahoma (Pet. App. A39).

The Langfords appealed on the grounds that the district court erred in determining the wheat field bank to be the boundary of their lands and, alternatively, that the court had erroneously denied their claim to ownership by adverse possession. The Jameses and the owners of the underlying

mineral interests cross-appealed from the determination that the United States is the owner of the bed of the Red River opposite a portion of the James's land and south of the medial line of the river.

The court of appeals affirmed the decision of the district court regarding the location of the south bank of the Red River and determined that the district court had properly resolved all the disputed ownership issues (Pet. App. A11). The court of appeals specifically noted that the findings of the district court were supported by the record (*id.* at A10) and in accord with this Court's decision in *Oklahoma v. Texas, supra*.

2. Petitioners' claim in this Court (Pet. 14) appears to be that the court of appeals incorrectly affirmed a finding of fact by the district court — the location of the wheat field bank that forms the boundary of their land.¹ However, this Court has repeatedly held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. District Director*, 385 U.S. 630, 635 (1967) (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). Moreover, the findings of the district court, as affirmed by the court of appeals, are in full accord with this Court's pronouncements in the *Oklahoma v. Texas* litigation.

3. Petitioners also claim (Pet. 4) that the court of appeals erred in determining that changes in the bed of the Red River were avulsive and therefore that no land was added to their property through the process of accretion. See *Oklahoma v. Texas*, 261 U.S. at 341; *Texas v. Oklahoma*, 457

¹The location of the Texas bank of the Red River dictates the location of the medial line of the river, which, in turn, affects the boundaries of the land in dispute. The land in dispute involves approximately 900 acres (Pet. App. A18).

U.S. 173 (1982). Once again, petitioners are simply challenging a factual finding by the district court, upheld by the court of appeals, that such changes occurred through avulsion during several large floods since 1923 (Pet. App. A10, A30).

To be sure, since an interstate boundary is involved, federal law controls. But the citation of Oklahoma cases by the district court hardly demonstrates that the federal rule of avulsion was not applied. At all events, it seems clear that the facts found show an avulsive change as a matter of federal law.² The district court found that the stream had in fact moved away from the south boundary or wheat field bank by creating a new active channel more than 40 years ago (Pet. App. A29). On this basis, the courts below were fully justified in concluding that an avulsion had occurred and that the boundary was unaffected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

²As the Jameses point out (Br. in Opp. 17-18), Oklahoma and federal law on avulsion are similar, if not the same, and would lead to no different outcome in this case.